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**The effect of the 'war on organised crime' on the Mexican federal judiciary: a comparative case study of judicial decision-making**

Cardenas Gonzalez De Cosio, Ana

*Awarding institution:*  
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**The effect of the ‘war on organised crime’  
on the Mexican federal judiciary:  
a comparative case study of judicial decision-making**

**ANA CÁRDENAS GONZÁLEZ DE COSÍO**

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King’s College London  
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## Abstract

Using a comparative case study design, this thesis explores the impact on the Mexican federal judiciary of steep rises in violent crime, proliferation of armed organised crime groups, greater involvement of the military in crime control activities and the government's 'war on organised crime'. The thesis develops 'enemy penology' as a theoretical framework based on the observation that the Mexican government has increasingly conceptualised offenders as enemies and called for an explicitly militarised criminal justice response. Drawing on this theoretical framework, the thesis analyses qualitative data from two different sites – a 'crime control as warfare' scenario (highly militarised state) and an unchanged context (less militarised state). Findings are examined within the enemy penology framework and also drawing on theories of judicial behaviour and judicial roles in order to explain the overarching finding that judges seem to have insulated themselves from the 'enemy penology' promulgated by the government.

Analysis of 40 written judgements in drug cases and 28 semi-structured interviews with judges (drawn from a total of 56 interviews achieved during the fieldwork) indicated that decision making, guilt determination and sentencing were almost identical in the two locations despite stark differences in context. In both locations, the study observed an inclination to privilege police evidence, high conviction rates despite poor prosecutorial performance and insufficient evidence, and a tendency to impose minimum sentences. Interviewees discussed these issues as well as the impact of armed criminality, military involvement in crime control and judicial independence.

Overall, the Federal judiciary appeared to be not influenced by the enemy penology paradigm reproduced by public officials and criminal policies. Mexican judicial behaviour was found to be strongly shaped by a formalistic and legalistic understanding of judicial duties where accuracy in law interpretation is expected, disregarding other goals, including politics and policy considerations. This understanding is enhanced by the judiciary through strict observance of precedents, reversals and enhancing law-interpreter and ritualist judicial roles. Nonetheless, the empirical data also showed that judges' views and opinions are informed by strategic goals, attitudes, motives, managerial needs and the pursuit of self-respect and recognition. In sum, examining court judgements and judges' views about deciding cases in the light of the prevalent 'enemy penology' provided a rich understanding of the way decision-making in criminal matters is constructed by judges as well as the complex and often contradictory layers that comprise the image and role of the Mexican federal judge.

## Acknowledgements

I was advised by a colleague to think of a PhD in terms of moving a wall with your hands. You need, he said, to be confident that you will eventually move it, as long as you keep pushing as hard as you can. This process, from the start to the very end, has entailed moving a rocky and heavy wall indeed. It appears I have done it, but definitely with the help of many.

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## Introduction: The Mexican context

Several decades ago, many Latin American countries began a deep social, economic, political and legal transformation. The countries' emergence from authoritarian regimes was one of the main engines of change. Economic and political reforms sought market liberalisation and the establishment of democratic governments. Economic policy headed towards neo-liberalism, and electoral reforms fostered competitive elections. Reform of the justice system, including the criminal justice system, was a less important priority.

Authoritarian regimes may coexist with independent judiciaries for various reasons. Independent or otherwise empowered courts may be used, for example, to foster trust in the government's commitment to reinforce the legitimacy of the regime, to hold state officials accountable, or to pursue controversial reforms (Solomon, 2007). The Franco regime in Spain, for instance, had a relatively independent judiciary, but it lacked political significance because of limited jurisdictional scope (Guarnieri, Pederzoli and Thomas, 2002; Toharia, 1975). The regime's influence on the judiciary was possible, however, through two main strategies, on one hand, ordinary courts' had limited impact on social and public life, while on the other, special civil, commercial and criminal tribunals were created to further the regime's policies (Toharia, 1975). In the case of many Latin American countries, the judiciary was relatively isolated from external developments and was subject to a high degree of political manipulation and budgetary neglect (Begn  Guerra, 2007; Cavise, 2007; L pez-Ayll n & Fix-Fierro, 2003). Overall, systems of justice lacked resources, and practitioners were poorly paid (P rez-Perdomo & Friedman, 2003). Reforms of the justice system began in the early 1980s.

In a parallel manner, criminal justice systems across the region were held to be highly inefficient in identifying and trying the accused, and extremely arbitrary and abusive when dealing with those who were arrested and interrogated (Hammergren, 2007; Magaloni, 2012, Shirk, 2011). Most Latin American criminal justice systems came from an inquisitorial tradition and were characterised by excessive formalism, impunity, corruption and a tendency for punishment to fall heavily on the poor (Hammergren, 2007). Local jurists pressed for

change from an inquisitorial to an adversarial system, while national and international non-governmental organisations sought human rights enforcement and the strengthening of democratic governance via judicial reform (Hammergren, 2007). In sum, the drivers for change across Latin America included: the democratisation process that political systems underwent after authoritarian regimes; negative perception of the criminal justice system; and the reassessment of human rights within the political (Pérez-Perdomo & Friedman, 2003).

Prior to reforms initiated in the eighties, the Mexican judiciary was legally prevented from hearing cases on political issues and generally sanctioned the government's decisions and policies. The judicial branch worked as an appendix of the government, controlled and manipulated by it (Iturralde, 2010, p.317). Judicial reform in Mexico began in 1987, and by 1994 a set of constitutional reforms to empower the judiciary had been established (López-Ayllón & Fix-Fierro, 2003; Pérez-Perdomo & Friedman, 2003). These reforms expanded the National Supreme Court of Justice's (scjn) jurisdiction as it was given the ability to limit government authority by invalidating unconstitutional acts or laws<sup>1</sup> and to determine political boundaries between different entities of the Mexican State. The reforms increased the judiciary's political relevance as a mechanism for constitutional control, largely due to jurisdictional expansion (Finkel, 2005).

As Solomon (2007) argues, empowering a high court during a fading regime does not sit well within an authoritarian setting. The empowerment of the scjn in the last years of the PRI's authoritarian rule has several possible explanations. Magaloni argues, for instance, that President Zedillo's leadership was challenged by members of the opposition parties and later on by members of his own party (2003). This led Zedillo to delegate the resolution of political disputes and constitutional matters to a neutral arbiter (Magaloni, 2003). In contrast, Finkel maintains that as the president foresaw that his party would lose the following election and thus become the opposition party, he decided to empower the judiciary as a way of constraining the incoming president's actions

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<sup>1</sup> The 1994 reform inserted two new scjn functions: to resolve "unconstitutionality of laws" petitions and "constitutional controversies". The former refers to the possibility of invalidating laws passed by any federal or state legislature where a law may be declared null and void. The latter refers to the scjn's right to resolve conflicts between public entities claiming an infringement on a matter of jurisdiction. The court's decision will have a generalised effect (rather than only affecting the parties to the controversy), if eight out of eleven justices vote in favour--or, in cases of constitutional controversies, if a higher entity challenges a lower one. If this majority is not reached or a lower body challenges a higher one, the decision only affects the parties and thus the law object of the case would continue in effect (Finkel, 2005).

(2005). A third explanation holds that Zedillo's lack of legitimacy to govern prompted him to delegate power to the judiciary. This explanation takes into account that 1994 began with the uprising of the Zapatista guerrilla movement, the signing of the North American Free Trade Agreement (NAFTA) and the assassination of a Presidential candidate (Inclán, 2009).

Institutional arrangements within the judiciary were also modified in order to strengthen its independence and insulate it from political influence. These arrangements concerned judges' tenure, financial stability and appointment procedures (Finkel, 2005, p.89; Solomon, 2007, p. 124). In 1995, a non-partisan council, the Federal Council of the Judiciary (*Consejo de la Judicatura Federal*, CJF) was created. This council is headed by the chief justice of the SCJN. The council's mixed membership was designed to prevent external influences affecting its decisions (Finkel, 2005, p. 96). The CJF is in charge of the professionalism, governance and discipline of federal judges and other court officials and investigates acts of corruption, incapacity and negligence (Concha *et al.*, 2007, p.202; López Ayllón & Fix Fierro, 2003).

The Mexican criminal justice system was not reformed at the same pace as the judiciary or other criminal justice systems in the region.<sup>2</sup> While Chile began its criminal justice reform in 2001 and Colombia in 2002, Mexico did not reform its Constitution until 2008. The Mexican criminal justice reform comprised four main elements:

1. introduction of new adversarial procedural rules, including orality, alternative sentencing and alternative dispute resolution mechanisms;
2. express recognition of adversarial values related to defendants' rights, including presumption of innocence, due process and adequate legal defence, as well as victims' rights;
3. changes to police agencies dealing with training, discipline and their role in criminal investigations;
4. tougher measures for combating organised crime (Shirk, 2011).

In consequence, Mexican criminal justice system reform did not follow a single rationale but followed various and contradictory goals. On the one hand,

---

<sup>2</sup> Chile, for example, began to introduce new procedures in two regions in 2001 and Colombia reformed its Constitution in 2002 in order to include an adversarial criminal justice system, whilst Mexico did not begin constitutional reform until 2008 and waited five more years to produce a National Procedural Criminal Code. Nonetheless, several state congresses reformed state legislation to gradually move towards a more adversarial system before federal legislation was changed.

tougher measures concerning organised crime included changes to special legislation that reduced procedural safeguards and increased severity of sentences. On the other, the introduction of adversarial principles was intended to ensure that criminal proceedings would rely on due process values to achieve fairer outcomes and introduce further safeguards to prevent wrongful convictions (Carbonell & Ochoa, 2009).

The slow pace of Mexico's criminal justice system reform may partly be explained by a severe safety crisis beginning in 2001 in which violent crime increased while law enforcement agencies were found to be deeply corrupt and so ineffective that "crime achieved high levels of efficiency and enjoyed impunity" (Regalado Santillán, 2002, p. 181; Shirk, 2011). This crisis was worsened by high-profile violent crime related to drug trafficking; the United States pressured Latin American countries, including Mexico, to participate actively in the war on drugs and to rely on the military in this effort (Buxton, 2006, p. 62-63; Shirk, 2011).

The safety crisis, described below, reached its peak during President Felipe Calderón's administration (2006 – 2012). The number of violent offences grew exponentially, reflecting the changing dynamics within drug-trafficking organisations. The death toll by the end of the administration exceeded 120,000 killings (INEGI quoted by Robles de la Rosa, 2014). As Osorio claimed, "the lethality of this surge of criminal violence is comparable to the onset of 50 civil wars in only six years" (2013, p.1). At the same time, the army's<sup>3</sup> intervention in civil affairs focused mainly on anti-drugs efforts, which had begun earlier, heightened by ineffective and corrupt law enforcement agencies. Former military members joined attorneys general and attorneys state offices as well as police forces and participated actively in training the police and in conducting operatives to arrest suspects and seize drugs, weaponry and other illicit objects.

## Safety crisis

The analysis of the 'safety crisis' set out below addresses three main features of the puzzling escalation of violence in Mexico: the steep rise in violent offences, the changing dynamics within drug-trafficking organisations linked to state's anti-drug efforts, and the severe social issue of impunity and generalised lack of public trust in criminal justice institutions.

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<sup>3</sup> The Mexican military comprises the army and the navy corps.

### *Increase in violent crime and drug trafficking*

Crime rates, both state and federal offences<sup>4</sup>, declined in the late 1990s, but saw a sudden increase in 2006 and 2007. During President Ernesto Zedillo's administration (1994 – 2000), the monthly average number of reported state offences was 116,756; during Felipe Calderón's administration (2006 – 2012), this rose to 136,499 offences, an increase of 17 percent.<sup>5</sup> During the same period, the monthly average number of federal offences increased from 6,308 to 13,331, a rise of 74 percent (México Evalúa, 2011).

Overall crime rates increased but, more importantly, serious and violent offences, such as homicide, kidnapping and extortion, also grew steeply. Similar to the general crime trend, homicide rates had a declining tendency that reversed after 2007. According to INEGI,<sup>6</sup> used by México Evalúa, the national homicide rate in 1990 was 16.6 deaths per 10,000 inhabitants, which dropped each year until 2007, when the figure was 8.1 deaths per 10,000 inhabitants (2016). In 2008, this tendency reversed; homicides rose to 12.6 per 10,000, which meant that between 2007 and 2009, INEGI recorded 42,064 homicides (Merino, 2011). The peak was reached in 2011 with 23.5 per 10,000 but dropped again the following year; by 2014 there were 16.4 homicides per 10,000 inhabitants (México Evalúa, 2016). Even though homicides dropped from 2012 onwards, they have not reached Mexico's lowest rate. Kidnapping also rose significantly during the period of increasing homicide rates: between 2007 and 2010, the number of reported cases grew by 266 percent.<sup>7</sup> Extortion cases rose by 73 percent<sup>8</sup> from 2007 to 2008—from 751 to 1,298 incidents—and rose a further 40 percent from 2008 to 2009 (ICESI, 2011).

The number of offences grew more in states receiving federal aid in the form of military forces acting to curb drug trafficking. As a consequence, some parts of the country were affected by this crime wave much more than others; some territories are more valuable than others for purposes of drugs production, distribution, wholesale and retail (CIDAC, 2012; Merino, 2011; Osorio, 2011; Ríos, 2013). As a result, violence did not spread evenly across the country

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<sup>4</sup> State offences are those found in state legislation and investigated by state authorities. By comparison, federal offences are those considered to have an impact on the whole country, such as conspiracy, terrorism or drug trafficking. Federal offences are found in federal laws and investigated by federal institutions. The vast majority of offences are state ones and represent above 90 percent of the total number of registered offences.

<sup>5</sup> This figure concerns mid-2010.

<sup>6</sup> National Institute for Geography and Statistics.

<sup>7</sup> The number of reported kidnappings increased from 229 to 608.

<sup>8</sup> The number of reported extortions rose from 1,298 to 1,819.

but rather became highly concentrated in a few regions. From 2006 to 2010, 84 percent of homicides were located in only four out of 31 states and Mexico City (Ríos, 2013). Possibly the most disturbing situation occurred in the state of Chihuahua, where homicide rates grew abruptly. For instance, 12.7 deaths per 10,000 inhabitants were reported in 1990. In 2007 this figure increased to 15.3, but in the following year it shot up to 75.9 (México Evalúa, 2016). In 2014, the homicide rate decreased, but only to 46.1 (México Evalúa, 2016).

Homicides related to drug-trafficking organisations have distinctive characteristics which foster widespread fear. (Shirk & Wallman, 2015). These characteristics include the use of high-calibre battlefield weapons such as AK-47 rifles and grenades, use of particular tactics that include assassinations of law-enforcement agents and journalists, street gun battles, and extreme forms of violence such as torture, dismemberment and decapitation, all of which send overt messages to authorities and rival organisations (Osorio, 2013; Shirk & Wallman, 2015, p. 4-5). At the same time, drug-related killings are very high-profile and spectacular in nature, intentionally displaying evidence of their violence. These involves public display of decapitated heads and other body parts, hanging bodies from bridges and other public spaces, open assassination of government officials, and shootings in public spaces (Shirk & Wallman, 2015, p. 7).

According to Osorio (2013 p. 168-69),<sup>9</sup> one of the main strategies used by the federal government to respond to drug-trafficking organisations was to arrest suspects for organised crime-related offences and seize illicit drugs and drug-related assets such as property (e.g. mansions, safe houses, storage facilities); vehicles including armoured vehicles, speed boats and aeroplanes; and weaponry ranging from pistols and semi-automatic weapons (e.g. AK-47 or R-15 rifles) to explosives and rifles capable of piercing armoured vehicles (e.g. Barret m82 rifles) (Osorio, 2013 p. 168-69). State forces also relied, though less frequently, on violent strategies, including operations where government authorities attacked, wounded or killed suspected members of criminal organisations or repelled an attack from them (Osorio, 2013, p.168).

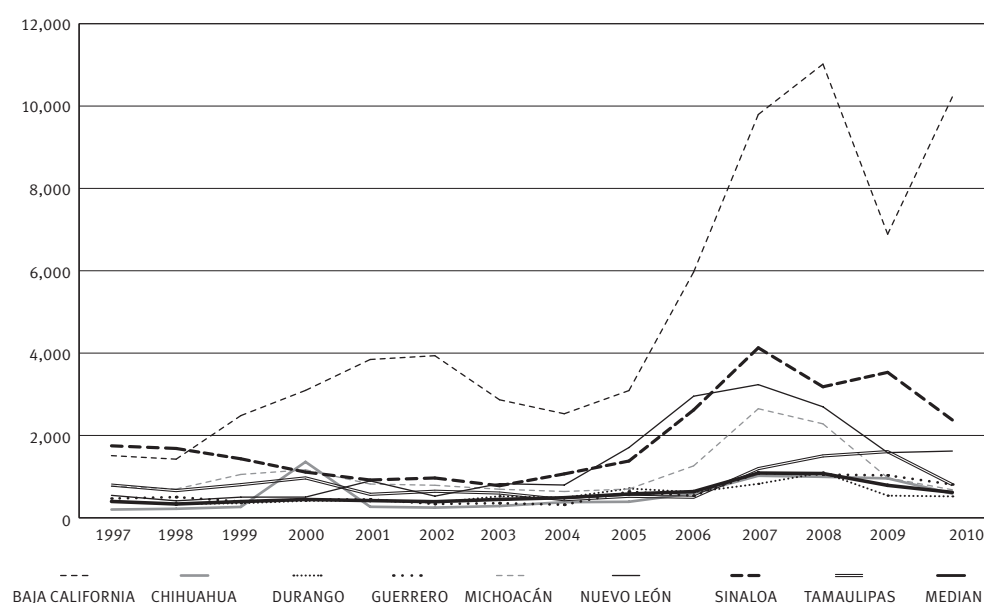
As a result, federal offences, in particular those involving drugs and firearms, rose sharply, including in states where levels of these offences had hitherto remained low. As will be explained below, drugs and firearms seizures were a priority tactic used by the federal government to respond to drug-trafficking organisations. The following table shows the number of drug offences recorded

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<sup>9</sup> From a total of 251,167 registered events of drug-related violence from 2006 to 2010, 32.6 percent and 25.2 percent concern drug seizures and arrests respectively. Violent law-enforcement tactics represented only 2.4 of the total events coded in a database that recorded daily national media reports during that time period (Osorio, 2013, p. 169).

by the Attorneys General from 1997 to 2010 in states where the military intervened (eight states), and also the median, in order to give an approximation of the rate in the remaining states (23 states).

Table 1.1 Recorded drug offences in Mexico by state: 1997-2010



Source: Data obtained from the Executive Secretary of the National System of Public Safety in “Criminal incidence concerning Federal Jurisdiction 1997 – 2012”, consulted on 20<sup>th</sup> March 2012.

As Table 1.1 shows, many states experienced a significant increase from 2005 onwards. While median growth from 2005 to 2008 was 46 percent, Baja California saw the greatest increase, 72 percent.

In sum, in a relatively short period of time, several regions of the country became battlefields. The unprecedented rise in crime described above illustrates the extent to which the country was affected. Crime became one of the most pressing concerns within Mexican society (El Universal/Buendía & Laredo, 2014). The growing level of violence is strongly related to the changing dynamics within drug-trafficking organisations described below.

### *Changes within drug- trafficking organisations*

For decades, drug-trafficking organisations conducted illegal activities in relative harmony and peace (Astorga & Shirk, 2010; Osorio, 2011; Ríos, 2013). Drug smuggling from Mexico to the United States can be traced back to the



beginning of the twentieth century and large-scale smuggling to the 1950s (Osorio, 2011). Drug-trafficking organisations flourished in the 1970s, when the U.S. demand for heroin increased in the context of the counter-culture movement and the breaking of the “French connection” importation route (Astorga & Shirk, 2010). The growing U.S. demand for cocaine was met by Colombian drug-trafficking organisations that moved it through Miami, the Gulf of Mexico and the Caribbean (Krauze, 2012). As access by sea became more restricted, Colombians relied more on Mexican smuggling networks, which gained control over the smuggling routes into the U.S. after the disintegration of Colombian drug-trafficking organisations (Astorga & Shirk, 2010). Mexican involvement in the cocaine market in the 1970s and 1980s, together with protection from the state, led to higher levels of prosperity within drug-trafficking organisations in Mexico (Astorga, 2007; Astorga, 2012).

Mexican drug-trafficking organisations expanded in parallel with the intense process of economic integration. When Mexico entered the North American Free Trade Agreement (NAFTA) with Canada and the U.S. in 1994, new channels of licit but also illicit commerce opened. Just like any other, these illicit organisations took advantage of technological developments and new financial structures (Astorga & Shirk, 2010; Krauze, 2012). Mexico replaced Colombia as the most important supplier of drugs to the U.S., providing approximately 70 percent of the cocaine, 80 percent of the marijuana, and 30 percent of the heroin consumed (Andreas 1998, quoted by Ríos, 2013).

In addition to the decline of Colombian drug-trafficking organisations and the opening of the borders, Mexican organisations’ blossoming was due to the political structure then in place (Astorga & Shirk, 2010). Although drug dealing was legally prohibited, its prosecution was only selectively enforced and anti-drugs operatives were rare. The centralised power exercised by the ruling party in government, the Institutional Revolutionary Party (Partido Revolucionario Institucional, [PRI]) was not only permissive but also protective of organised criminal activities as long as the criminals paid bribes to corrupt government officials (Astorga, 2007). Moreover, corruption took place at high levels of government, which meant that immunity trickled down within the government, offering protection to gang members who could afford to pay (Astorga & Shirk, 2010). Under these conditions, drug-trafficking organisations functioned with relative stability, unaffected by competition, in large part because of arrangements with government officials, who established “plazas” or territorial zones of control where specific drug-trafficking organisations operated, as well as the rules of the game (Astorga & Shirk, 2010). Those who did not agree with these rules or broke them had three choices: accept them, face prison or face death



(Astorga L., 2012). Drug-trafficking organisations were not challenged by the government, and although competition and conflict between these organisations existed, these encounters did not involve as much violence as they did later on. These organisations, like other groups of organised criminals, resorted to force occasionally, either to enforce agreements or to ensure their territorial dominance (Gambetta, 1993 and Reuters 1998, quoted by Osorio, 2011).

The relatively stable balance between the state and criminal organisations changed in the face of political pluralism, electoral democracy and decentralisation, together with anti-drugs efforts. In the 1990s other political parties gained power at the state level, and in 1997, the ruling party, PRI, lost its majority in the national Congress. In 2000, PRI lost the presidential election for the first time in 70 years. As a result, state power was redistributed, fragmented and weakened, which meant that arrangements once created and enforced by a unified government became highly contested (Astorga, 2007; Astorga, 2012). Power centralised in the hands of a single cohesive hegemonic party helped enforce arrangements with criminal groups, giving these groups an incentive to remain unified (Ríos, 2013). Decentralisation and pluralism changed the rules of corruption, allowing criminal groups to engage in criminal operations with different parties and also reducing the incentive to remain cohesive (Astorga & Shirk, 2010; Ríos, 2013).

By the late 1990s onwards, competition and conflict among major drug-trafficking organisations increased. These organisations engaged in violent encounters to gain control over “plazas” and access the lucrative U.S. market (Astorga & Shirk, 2010 p.16). Battles for territory amongst traffickers frequently happen in illegal markets, where formal mechanisms as well as systematic rules to deal with disputes and disagreements are absent. Drug trafficking organisations dislike sharing territories because sharing increases the costs of corruption, reduces their share of the local market and makes production inputs scarcer (Ríos, 2013).

Although previous presidents had resorted to the army to conduct anti-drug efforts, President Calderón relied overtly on the military, declaring war on drugs and organised crime in 2007, first in one region—Michoacán—and later extending this war to many other regions across the country (Krauze, 2012). Violence erupted once state operatives were deployed. These operatives aimed at restoring order and maintaining the state’s legitimate monopoly of violence, however, they led to increases in violence (Bowling, 2011; Osorio, 2011). There is consensus within recent scholarship that government crackdowns substantially contributed to the escalation of violence (Osorio, 2013; Osorio, 2015; Shirk & Wallman, 2015; Ríos, 2013).

Drug-trafficking organisations attacked law enforcers in order to preserve their organisational power structure and secure their profits (Osorio, 2011). These confrontations undermined the state's capacity to provide security against widespread criminality. The violence triggered by these confrontations caused casualties within law enforcement agencies, criminal organisations and third parties, including journalists and civilians. At the same time, the state's coercive actions weakened one criminal organisation but indirectly improved the position of its rivals, causing further violent encounters between criminal organisations (Osorio, 2015; Ríos, 2013). In addition, conflict erupted within drug-trafficking organisations as a consequence of both inter-organisational and state coercive actions, both of which disrupted operations and trust and generated leadership vacancies (Osorio, 2011). Violence also grew as a result of the proliferation of lower-level criminal networks operating at street level and contributing to the growing phenomenon of low-level drug dealing. Illicit activities expanded with the increase in criminal groups. These groups diversified into kidnapping, extortion, collective killings and fuel theft (Astorga & Shirk, 2010; Krauze, 2012).

Bowling (2011) argues that anti-drugs operations, followed by encounters between law enforcement agents and criminal organisations and between and within organisations, reveal the iatrogenic effect of drugs prohibition. In clinical iatrogenesis, treatments used to address particular sicknesses induce further harm; in social iatrogenesis, socioeconomic transformations are made necessary so that these treatments can be administered. In the case of drug violence in Mexico, anti-drugs efforts and state agents contributed to new kind of unsafety that spread across the country when new forms of deviance emerged. On the one hand, criminal offences that cause serious harm, such as kidnapping and extortion, expanded as smaller criminal organisations blossomed. On the other hand, human rights violations by the military and other state officials grew exponentially; reports of arbitrary detentions, illegal property searches and torture increased in a very short period of time, as detailed below. For instance, in Michoacán, where the initial battle of Calderón's war was fought, torture reports increased by 300 percent in 2008 (Maldonado Aranda, 2012).

At the same time, the militarisation of law-enforcement agencies and operatives illustrates the social iatrogenic effect. The increased degree of militarisation (discussed in Chapter 4), enhanced under President Calderón's administration, may be observed, as Kraska (2001) points out, in the following: changes in organisational settings that incorporated special units focused on drug trafficking; greater operational use of high-calibre weaponry designed for use in war; and the public promotion of military values to address social issues.

As Mexico's safety crisis escalated, violent crime became more organised and far better equipped with battlefield weapons, while the death toll increased. Politicians resorted to framing law enforcement actions as being both metaphorically and literally waging war against organised crime. "Today, more than ever, such unity is required to defeat an enemy who threatens to destroy the population's tranquillity and its institutions".<sup>10</sup>

As is the case in other jurisdictions, Mexico has witnessed increasingly heavily armed police, the involvement of military forces in crime control and investigation and the introduction of military values, equipment and discourse into law enforcement, courts, criminal justice and punishment. In this context, the question addressed by this thesis is: what impact, if any, has this 'war' had on judges and their judgements in ordinary criminal cases concerned with narcotic and psychotropic drugs?

### *Impunity and institutional crises*

The 'dark figure', which represents offences left unreported and unrecorded, has consistently been over 80 percent, highlighting a systematic problem of unpunished offences in Mexico, referred to as impunity (Zepeda Lecuona, 2011). According to the Global Index on Impunity,<sup>11</sup> Mexico was ranked 58 out of 59 examined countries. The net result is that perhaps one or two out of 100 crimes end in conviction (Shirk, 2011). Only 14.8 offences in every 100 are reported and only 26 pre-trial proceedings in every 100 are submitted to a court (Zepeda Lecuona, 2011). The fact that authorities may only react to a minor proportion of crime signifies that a large number of offences are left unpunished and only 2.1 offenders out of 100 are likely to be arrested. This fosters a sense of impunity among perpetrators and within society in general (Zepeda Lecuona, 2011). This problem is exacerbated by the fact that violent offences affect many people. For instance, kidnapping cases affect not only the kidnapped victim but also those who fall into poverty when a breadwinner is kidnapped or killed

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<sup>10</sup> Speech given by the head of the Superior War School (Escuela Superior de Guerra) in regard to President Calderón's call for unity in response to organised crime, July 23, 2010. <http://www.sedena.gob.mx/index.php/sala-de-prensa/discursos>

<sup>11</sup> The Global Index of Impunity was first published in 2015 and created by the Centre of Impunity and Justice Studies (Centro de Estudios sobre Impunidad y Justicia, CESIJ), hosted by the Universidad de las Américas in Puebla, Mexico. The impunity index analyses three elements: human rights, safety, and justice. This index seeks to build an index taking into account possible causes and conditions that foster impunity, together with those actors deemed responsible for impunity and the perception of society in general. The Global Index examines 193 countries that are part of the United Nations, but only 59 of these had statistical information available to calculate the country's impunity (CESIJ, 2015).

(México Evalúa, 2011).

Although the type of offence and the harm produced make a significant difference to whether an offence is reported, victimisation surveys reveal widespread distrust in the prosecution service and the police, which in part explains victims' reluctance to go to the police. Also, this reluctance is explained by the victims' perception that reporting a crime is a fruitless and time-consuming process (INEGI, 2011; México Evalúa, 2011). Concerning public confidence, both the police and the prosecution service have consistently appeared to be public institutions with hardly any public trust (Consulta Mitofsky, 2009; INEGI, 2011). In fact, only one-third of the population deems the prosecution service's work effective (INEGI, 2011) and 38 percent of the population consider that helping the police in their city is dangerous (Consulta Mitofsky, MUCD, 2015). A purge of police forces was part of the 2008 constitutional reform, and in 2010 the federal government created an initiative in which state police groups were instructed to undertake a number of tests, including polygraph, medical, and psychological tests, to assess their reliability.<sup>12</sup> In some parts of the country, state and municipal police forces were suspected of colluding with criminal groups to the extent that in Nuevo León, for instance, police forces were purged based on possible complicity and corruption with criminal groups (Astorga, 2007; González Parás quoted in Birkbeck, 2013). Also, the number of killings, kidnappings and other forms of violence against police officers and other state officials grew. For instance, in a period of 17 months, 450 killings of police officers, prosecutors and members of the army were reported to the Attorney General (Notimex, 2008).

The extreme levels of ineffectiveness, impunity and corruption, as well as the lack of public trust in the police, were all arguments used to support martial involvement, initially to fight drug trafficking and later to respond to crime in general (Camp, 2005; Moloeznik, 2009). In contrast to the police service, the army enjoy wide credibility among the population (Consulta Mitofsky, 2009; INEGI, 2011). Nonetheless, human rights organisations have repeatedly held that Mexican law-enforcement agencies, including martial ones, are prone to using torture and other illegal practices while conducting crime investigations. For instance, Human Rights Watch held that the number of forced disappearances had increased steadily since 2007 and found clear involvement of law enforcement agents in the detention and subsequent disappearance of victims (Human

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<sup>12</sup> The initiative was formally approved by the National Council of Public Safety on November 28, 2008. The National Model to Evaluate and Control Reliability was ratified on February 4, 2010 by the Permanent Commission of Certification.

Rights Watch, 2013). Since 2006 more than 22,000 people have disappeared, but president Calderón and other high profile officials argued that the victims killed were involved in drug trafficking (Human Rights Watch, 2013). Amnesty International (2015) and Human Rights Watch (2013) sustain that most victims have been abducted by criminal groups, but in many cases the involvement of state forces was established, either directly or in collusion with criminal groups.

In this regard, Iturralde points out that many members of the security forces are used to fighting crime and exercising social control in the same fashion as they fought political opposition under previous, more authoritarian, regimes (2010). In addition, it is rare that the security forces are subjected to independent investigation (Hadden, 2000). They have come to believe that they are not accountable to civilian courts or other civilian authorities for their actions (Iturralde, 2010, p. 323).

## Contradictory reforms

The contrasting elements of the 2008 constitutional reform were a response to different aspects of the safety crisis. One set of changes sought to guarantee fairer criminal proceedings by introducing an adversarial system and trying to enforce due process principles and human rights more effectively. A different set of reforms, introduced almost simultaneously, attempted to strengthen crime control policies by criminalising certain behaviours, thus increasing the catalogue of criminal offences, facilitating the conviction of particular types of offences such as drug trafficking and money laundering, allowing pre-emptive measures such as *arraigo* (extended detention of a suspect for the purpose of investigation), enabling stronger martial intervention in crime control activities, and increased severity of punishment. As a result, conflicting reforms were made: on one end, a wide range of due process principles were aimed at ensuring equality of arms and presumption of innocence,<sup>13</sup> and on the other, a number of rules were designed to increase efficiency in fighting organised crime even though they compromised fairness.

### *Shifting from a quasi-inquisitorial system to an adversarial one*

The Mexican system has been described as a quasi-inquisitorial or mixed criminal justice system, where pre-trial proceedings are said to be mainly inquisitorial while trial proceedings are closer to adversarial principles (Hernández Pliego,

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<sup>13</sup> Due process principles that already existed in criminal law were strengthened through their constitutional recognition.

2003). The way in which federal criminal proceedings are currently managed is described in Chapter 6. Despite the risk of oversimplifying, however, it is important to bear in mind the main characteristics of inquisitorial, adversarial and Mexican quasi-inquisitorial systems in order to understand the implications of a shift from one system to another.

Traditionally, the main goal of an inquisitorial criminal proceeding is to determine the truth in a legal matter (Hernández Pliego, 2003; Hammergren, 2007; Weiden, 2009). This means establishing whether a crime was committed and by whom (Cavise, 2007; Hernández Pliego, 2003). This ideological stand shapes the roles played by prosecutor, defence and judge during proceedings. For example, the suspect (later, the defendant) is thought of as an object of investigation who may contribute to the investigation of the truth as opposed to a party in proceedings (Carbonell & Ochoa 2009; Weiden, 2009). The judge typically performed both investigatory and adjudicatory roles, but in the modern inquisitorial proceedings developed in continental Europe the formal investigation and trial are conducted by two different state actors (Hammergren, 2007; Weiden, 2009). In the earlier stage, or pre-trial proceedings, the prosecutor (or investigative judge) conceived traditionally as a neutral investigator, prepares a dossier containing a thorough report of the investigation that will be later used by the judge during trial. The prosecutor or investigative judge is thought of as an impartial actor whose main task is ensure that justice is done and society's interests served by pursuing the investigation to its evidentiary conclusion before entering the trial phase (Cavise, 2007; Hammergren, 2007; Weiden, 2009).

During trial, the role of the judge overshadows that of the other parties. The judge controls proceedings and, based on the written dossier, outlines the major legal issues and facts of the case and may request further investigation. He is in charge of evidence production and assessment, at times rules instruct the ways in which evidence is produced in court and the value or weight that evidence has in the final decision (Hernández Pliego, 2003). Parties to the case—prosecutor and defence—may not introduce evidence but must instead focus on the legal interpretation and implications of the legal responsibility of the suspect (Cavise, 2007). They also may make recommendations on the verdict and sentencing (Hammergren, 2007). As a result, the lawyers' input is subsidiary. In the final stage, the judge determines guilt or innocence and any subsequent sentence. Proceedings are managed mainly through the written dossier and maintained in secrecy (Carbonell & Ochoa 2009; Hernández Acero, 2000).

By comparison, it is presumed in adversarial criminal proceedings that the truth of the matter at hand is best unravelled by the prosecution and defence. Evidence admissibility is wide and evidence is freely weighed by the decision-



maker (Hernández Pliego, 2003). Hence, adversarial systems seek to safeguard individual rights through due process; in particular, the defendant's personal freedom is only affected once the state has demonstrated beyond reasonable doubt that the allegations against the defendant are sustained (Weiden, 2009). It is the parties, not the judge, who mostly affect the course of proceedings, including the production of evidence used to support each party's allegations. The judge acts as a neutral and often silent referee, and the participation of laymen in deciding innocence or guilt is common (Weiden, 2009). Proceedings are mainly conducted orally and in public (Hernández Acero, 2000).

Some of the main characteristics of the Mexican criminal justice system follow inquisitorial principles: **FIRST**, the aims pursued by criminal proceedings are to punish the guilty based on determining the truth of the criminal events submitted to the court by the prosecution. The truth of the matter is based on determining whether a crime was committed and if so by whom (Cavise, 2007; Hernández Pliego, 2003). **SECOND**, the prosecutor is formally understood as a neutral authority entrusted with investigating crime, whose responsibility generally culminates with an indictment showing what criminal offence was committed and who was responsible for it, paired with the evidence that supports the indictment (García Ramírez, 1994; Hernández Acero, 2000). In practice, the prosecutor tends not to produce further evidence in trial or submit final allegations before the verdict is reached, as will be discussed in Chapter 7.

**THIRD**, the dossier formed during pre-trial provides the judge with information on the criminal acts in question so that a trial can be conducted and ultimately a verdict reached (Hernández Acero, 2000). Despite the fact that formally the investigation is separate from the actual adjudication of the case, the prosecutor strongly affects the course and outcome of the trial, as pre-trial findings are generally confirmed in trial (Cavise, 2007; Pásara, 2006). This is mainly due to evidence principles that instruct judges to give evidence specific weight, as will also be explained in Chapters 4 and 7 (Carbonell & Ochoa, 2009). By comparison to the prosecutor, the defence attorney and defendant are mainly participants in the process (Cavise, 2007).

**FOURTH**, compulsory custodial remand (or pre-trial detention) is frequently used, which means that suspects' personal freedom is affected from the outset, producing a high proportion of unsentenced prisoners (Hammergren, 2007). Fifth, proceedings are mostly managed in written form; whenever evidence is given live, it is usually only given before a clerk, who writes the testimony down in the form of a statement and later presents it, with the rest of the file, to the judge (Cavise, 2007). The written form implies that access to the file is only available to the parties involved, if at all, thus maintaining secrecy. As a result,

criminal proceedings are strongly guided by an inquisitorial rationale.

As mentioned above, changes to the criminal justice system were advocated by local jurists, as well as international and national NGO members, on the grounds that inquisitorial proceedings enhanced arbitrary practices, were designed to operate in an authoritarian regime with low crime rates, and were intended to uncover illicit practices systematically conducted by state agents (Magaloni, 2009; Teitel, 1993). As the country's political system began to shift from a single-party regime to an electoral democracy, a shift that was followed by rising crime rates, the criminal justice system proved to be outdated and inefficient (Magaloni, 2009). The typical constitutional guarantees and human rights are contained in the Constitution, including presumption of innocence, prohibition of lengthy detentions without trial, and due process.

However, critics argued that the Mexican criminal justice system had serious flaws to the extent that they considered it operationally broken, rendering many constitutional protections meaningless and void (Cavise, 2007). For instance, over 70 percent of proceedings are initiated by the arrest of suspects *en flagrancia*. Such cases can therefore enter the criminal justice system without any preceding criminal investigation or an arrest order issued by a court (Zepeda Lecuona, 2011). At the same time, suspects have consistently reported ill-treatment, especially during arrest, including beatings, torture and other humiliating practices (Azaola & Bergman, 2010; Azaola & Correa, 2012). During trial, judges tend to remain in their chambers studying a dossier or case file while witness hearings are conducted by clerks in a different office of the court (Cavise, 2007). This practice is so common that nine out of ten defendants mistook the clerk for the judge during trial proceedings (Azaola & Bergman, 2010, Azaola & Correa, 2012).<sup>14</sup> Almost half the prison population is on remand; statistically, nine out of ten will be found guilty (México Evalúa, 2013). At the same time, the rate of unpunished offences was calculated to be above 90 percent (Zepeda Lecuona, 2011) and victims' needs and allegations were neglected, to the extent of being forbidden to access to the dossier or casefile and appear before court. The criminal justice system has been described as "authoritarian, unbalanced, irrational and with null guarantees", ineffective and unfair, offering no satisfactory response to any of the parties involved (Carbonell & Ochoa, 2009; Magaloni, 2009, p. 1; Zepeda Lecuona, 2011, p. 262).

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<sup>14</sup> The common practice among state and federal trial judges of not participating in hearings has been repeatedly documented. Surveys carried out in 2002, 2005 and 2009 of the state prison population report that the presence of the judge during hearings is rare; this was also found in the first survey carried out by the same team in federal prisons in 2011 (Azaola & Bergman, 2010; Azaola & Correa, 2012).



To enhance equality amongst the parties, reforms were made in the early 1990s to guarantee the defendant's right to an adequate defence. Also, confessions, once thought of as sufficient evidence to reach a verdict, were discarded if they were the only piece of evidence produced to sustain a case (Hernández Pliego, 2003). The relevance of confessions in determining the truth can be traced historically to religious inquisitorial proceedings. Hence, reforms began incorporating features attuned to adversarialism. However, a substantial shift did not happen until 2008, when the Mexican constitution was reformed in order to establish the adversarial criminal trial, expressing guiding principles for all criminal proceedings as well as defendants' and victims' basic rights. These guiding principles enumerate the main aims of a criminal trial: find the legal truth,<sup>15</sup> protect the innocent, convict the guilty, repair the damage done; the burden of proof lies with the prosecution, hence the defendant should be presumed innocent; all hearings must take place in the presence of a judge who will examine evidence produced in court and reach a verdict promptly; and illicitly obtained evidence must be disregarded.<sup>16</sup> Many implications flow from these constitutional reforms, as Cavise described: "the wholesale abandonment of the inquisitorial model in most of the countries in Central and South America represents a seismic shift in the international legal landscape which will have implications far beyond statutory reform" (2007, p. 786). For instance, a balance between prosecutor and defendant is pursued by imposing higher standards of evidence on the prosecution. This will have a direct effect on the roles played by each party and also on the outcome of cases. Also, openness in proceedings represent an important change, as access to proceedings will be available through public hearings. Easy access to proceedings conducted by the prosecutor and later the trial conducted by the judge enhances accountability. At the same time, the presence of the judge during hearings makes it impossible (or at least harder) to delegate decisions to courtroom staff (Carbonell & Ochoa, 2009; Hamnergren, 2007). Also, after the reform, the prosecutor will be entitled to decide whether to press charges or not—the opportunity principle—and to draw on alternative dispute resolution strategies to prevent cases from reaching court. By comparison, currently, all reported cases are prosecuted.

In addition to restructuring the criminal justice system in 2008, the Constitution was reformed in 2011 to establish the superiority of international human

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<sup>15</sup> Although pursuing the legal truth is an essential element of inquisitorial proceedings, and the reform sought a shift towards a more adversarial system, this aim was included in the constitutional reform.

<sup>16</sup> Article 20 of the Mexican Constitution.

rights treaties over the Mexican legal system (known as the “human rights reform”). That same year, the *scjn* issued a decision instructing judges to disregard Mexican provisions whenever human rights principles would grant greater protection to the parties involved, including those participating in criminal proceedings (Ramírez Saavedra, 2012).<sup>17</sup> Furthermore, in cases where specific norms contradict human rights, judges are expected to uphold the human rights principle over the local rule, together with the *pro homine* principle, which instructs judges to interpret the applicable norms in a case in the most favourable manner to the petitioner. Prior to the Constitution’s formal recognition, some of these principles, including the presumption of innocence, were acknowledged in binding case law issued by the *scjn*.<sup>18</sup> However, these were not fully embraced by the judiciary until they were formally inserted in the Constitution. As will be discussed in Chapter 9, the human rights reform has signified that judges are beginning to understand their role differently.

Adopting these principles was an essential part of the shift from the quasi-inquisitorial criminal justice system towards an adversarial one. However, the enactment of constitutional reform requires further legislation to operationalise the principles set in the Constitution.<sup>19</sup> Therefore, criminal justice proceedings could only begin to change once a new set of rules containing entirely new codes at both federal and state level were published by federal and state legislatures. As a result, the implementation of the new criminal justice system initially required that 32 state congresses and the Federal Congress enact a new criminal procedure code in addition to changes in secondary legislation. Progress across the country was uneven. Several states were pioneers in transforming their state criminal justice systems even before the constitutional reforms described above,

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<sup>17</sup> The decision of the *scjn* was issued in the case *varios 912/2010* published in the *Judicial Weekly Gazette*, Book I, volume 1, October 2011, in compliance with the resolution of the case *Radilla Pacheco vs Mexico* issued by the Inter-American Court of Human Rights. To see complete directives issued by the Inter-American Court see, for instance, the ruling “Conventionality control. Criteria to apply it in the judicial arena, according to the resolution of the National Supreme Court of Justice issued in the file *Varios 912/2010*”.

<sup>18</sup> For example, see the binding ruling “Presumption of innocence. This principle is contained implicitly in the Federal Constitution.”

<sup>19</sup> Several implications follow from a constitutional reform such as this: first, norms established within the Constitution embody not only rules but also principles that justify policy-making, judicial interpretation and further legislative modification. Also, changes in the Constitution set a standard to which all legislation, federal and state, must adhere and further legislative reforms must be made according to new constitutional provisions. Moreover, introducing particular concepts into the Constitution implies that the modification of these concepts requires a consensus from the federal Congress and the 32 state legislatures, including the federal district’s legislature.

but many states, together with the Federal Congress, resisted change. In light of the gradual and uneven transition to adversarialism, the Federal Congress published the National Criminal Procedure Code in 2014. This was intended to replace all state criminal procedure codes and would be applicable across the country. Its enforcement is planned to be gradual, so, for example, proceedings at federal level will only begin to change in 2016.

In parallel with drafting new legislation, further tasks had to be managed. These included: establishing training programmes, including orientation and specialised skills for different practitioners; strengthening public prosecution and defence; training the police in the handling of evidence; modifying infrastructure and equipment to support public hearings and other new proceedings; and setting up public education campaigns and programmes for private attorneys and law students (Borrego Estrada, 2010; Carbonell & Ochoa, 2009; Cavise, 2007; Hammergren, 2007). The scope of the transformation is wide and requires the cultural transformation of all criminal justice practitioners. “This situation represents a 180-degree turn in the way of organising and administering the work done by judges and prosecutors” (Borrego Estrada, 2010).

According to the former leader of the process of reform implementation, Felipe Borrego Estrada, such considerable change has faced strong resistance from many practitioners, including private attorneys, prosecutors and judges (2010). For instance, judges found the new rules and principles, in which their leading role in proceedings would be reduced to being a referee, difficult to accept, as they are accustomed to being in charge of most of aspects of proceedings (Cavise, 2007). In a similar way, practising attorneys are beginning to learn that they should undertake an investigation that is separate from that of the police and prosecutorial authorities. According to Cavise, attorneys have found this duty antithetical to the notion that the defence is not activated until the investigation is complete and the indictment formally submitted to the court, as would happen in a quasi-inquisitorial system (2007, p.805-806). Learning that the outcome of the trial will depend on the quality of advocacy has been difficult to accept (Cavise, 2007). The emblem of transformation has been orality or oral trials; transparent public trials are expected to make judicial work more accountable and produce a more legitimate and fairer criminal justice system (Cavise, 2007; Carbonell & Ochoa, 2009; Zepeda Lecuona, 2011). Whether orality, together with enforcement of adversarial principles and rules, will meet the expectations is yet to be seen.

### *Legal reforms designed to fight organised crime*

In the early 1990s, legislation to investigate and punish organised crime offences emerged in parallel to the wave of reforms promoting due process and the adversarial principles aiming to guarantee fairer proceedings and safer verdicts in the Mexican legal system. National interests drove efforts to effectively prosecute and punish offences linked to criminal organisations. Criminal organisations appeared to have a higher degree of labour specialisation and training, access to sophisticated technology and to substantial profits, with internal structures that fostered hierarchy and the enforcement of internal arrangements (Brucet Anaya, 2007). In particular, drug-trafficking organisations had outstripped the state's powers to incapacitate, prosecute and sentence this type of offender and the available set of laws contained in the criminal codes were seen as unequal to the task of dealing with these new forms of criminality (Brucet Anaya, 2007). In addition, the country faced international pressure to create and enforce effective security programmes to intensify the fight against drug trafficking.<sup>20</sup>

The legal category of organised crime was first introduced to the Constitution in 1993 and several reforms were made thereafter. The Federal Law against Organised Crime (FLOC) was enacted in 1996 and has been modified on more than ten occasions. The FLOC establishes a set of rules for investigating, prosecuting and punishing what this law defines as organised crime offences.<sup>21</sup> The FLOC sets forth (i) offences regarded as organised crime, (ii) procedural rules to follow when these offences are tried and (iii) aggravating factors to take into account when sentencing.

Justice Silva Meza described the legislative and constitutional reforms as “exceptional criminal law” (Silva Meza, 2001, p.225). This exceptional regime is still in place today and indeed has developed further. Many of the constitutional safeguards established after the 2008 reforms are not applicable to cases related to organised crime offences.<sup>22</sup> For example, *arraigo* or detention for the purpose of investigation is available for cases of organised crime; similarly,

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<sup>20</sup> In 1990 Mexico ratified the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, initially drafted in 1988, followed by the signature of further international conventions and agreements on transnational organised crime (Brucet Anaya, 2007).

<sup>21</sup> This Act was published in 1996 but has been subject to continuous reform ever since.

<sup>22</sup> Proceedings concerning organised crime will be governed by the new National Criminal Procedure Code. However, the specific procedural rules established in the FLOC will be applicable in cases of organised crime, disregarding the conflicting rules in the national code, according to the Fourth Transitory article of the National Criminal Procedure Code.

custodial remand is mandatory. Also, concerning evidence procedural laws, evidence produced during pre-trial will be valid in court even if cannot be produced before the judge.<sup>23</sup> As a result, both the Constitution and the FLOC established specific measures that permit particular types of offenders to be treated in a more coercive manner.

According to Brucet Anaya, the purpose of the FLOC is to discover the truth of actions committed by organised criminals (2007). The discovery of the truth is facilitated by a distinct set of crime investigation tools designed to incapacitate and prosecute members of criminal organisations. These tools include: extended periods of detention of suspects, infiltration by undercover state agents, and asset seizure (Brucet Anaya, 2007). The prosecution and ultimately punishment of organised crime offences is facilitated by the criminalisation of preparatory and planning acts and by lowered standards on admissibility of evidence where protected witnesses may be used in pre-trial proceedings and where guilty verdicts may be issued based only on indications.<sup>24</sup> For instance, legal and constitutional provisions establish that organised crime occurs once three or more people agree to organise to commit an offence in a permanent or frequent manner, so a defendant may be punished for the mere fact of agreeing to organise to commit a criminal offence, as opposed to actually committing an offence.<sup>25</sup> In other words, defendants may be punished for their intentions, rather than their actions (Fondevila & Mejía Vargas, 2010).

The fact that the legal description is vague has enabled prosecution services to wrongfully arrest and indict suspects for organised crime related offences. According to the Council of the Federal Judiciary, from 2001 to 2006, federal courts corrected the charges pressed in 24 percent of indictments. This indicates a high level of error in cases that involve severe restrictions to civil liberties (Fondevila & Mejía Vargas, 2010). This breach to civil liberties is aggravated by the fact that suspects can be pre-emptively detained, under an *arraigo* order issued based on mere indications (explained in Chapter 4), for a period of 40 days with the possibility of extending it to 80. Furthermore, if found guilty the defendant faces augmented sentencing tariffs where the maximum imprisonment period is 60 years (Brucet Anaya, 2007; Moreno Hernández, 2011).<sup>26</sup>

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<sup>23</sup> Article 16, eighth paragraph, article 19, second paragraph, article 20, section B, fraction V, second paragraph, all of the Mexican Constitution.

<sup>24</sup> Articles 14, 40 and 41 of the FLOC.

<sup>25</sup> Article 16 of the Mexican Constitution and Article 2 of the FLOC.

<sup>26</sup> Articles 4 and 5 of the FLOC.

As a result, the legal framework contained in the Constitution and the FLOC significantly reduces the already low procedural safeguards defendants have within quasi-inquisitorial proceedings. The ultimate goal is to facilitate the conviction of those accused of organised crime-related offences and punish them with great severity (Mancera Espinosa, 2007).

### *Increasing severity*

During the 1990s, parallel to adversarial reforms and organised crime legislation, legal reforms broadened the catalogue of criminal offences and increased the punishment tariffs for many existing offences (Mancera Espinosa, 2007; México Evalúa, 2013). Changes to the Federal Criminal Code resulted in more severe sentences (Islas de González, 2001). Similar reforms modified state criminal codes to increase maximum sentences. For instance, the sentence available for aggravated kidnapping in the state of Puebla grew in 2008 from 30 years to life imprisonment; in the same year another state, Veracruz, introduced life imprisonment for different variations of aggravated homicide (México Evalúa, 2013).

Punishment tariffs were also increased through the re-labelling of offences from non-serious to serious, and parole was curtailed, particularly for reoffenders. These longer sentences led to a rise in the prison population (Azaola & Bergman, 2007; González Salas, 2001; Islas de González, 2001; México Evalúa, 2013). The increased administrative workload affected the way in which parole was granted, making prison stays longer (Azaola & Bergman, 2007). Azaola and Bergman confirmed that 20 percent of the increase in prison population was due to the severity of sentences, which led to longer periods of incarceration, rejecting the idea that an increase in the crime rate was the main cause for the steep rise in incarceration (2007). As Islas de González argues:

The reduction of parole, together with the increased severity of punishment, notwithstanding what the offence intends to protect, produces, bluntly, departing from general prevention to establishing pure and simple repression, a characteristic of authoritarian regimes (2001, p.9).

The determination of punishment for criminal offences is strongly guided by the sentencing tariffs established in criminal codes. Bearing in mind popular concerns about violence and personal safety, elected officials have little incentive to reduce sentencing tariffs or include different non-custodial punishments in legislation (México Evalúa, 2013; Ríos, 2013). Nevertheless, the judiciary retains an element of discretion in sentencing, as will be explained in Chapter 4.

## Main enquiry and findings

By the end of President Calderón's administration in 2012, the political and social landscape in Mexico had become as fascinating as it was tragic. Its topography was characterised by exponential rises in crime, contrasting legal and institutional reforms aiming at toughening crime control policies and upholding due process principles, and security policies and operatives aiming to respond to the safety crises, relying on both civil and military forces. The context to government policies was characterised by mass media and political discourse where terms akin to warfare were used within a generalised nationalistic sentiment where offenders were framed as enemies of the state and society.<sup>27</sup> At the same time, opinion polls showed increasing support for harsher punishment of criminals and a more visible military presence across the country (Consulta Mitofsky, 2009). In addition, the media praised stories where ordinary people used private means to defend their land or property from criminal groups.<sup>28</sup>

Society at this point appeared to favour stronger public and private responses to crime. At the same time, the executive branch of government, while demonising offenders, pushed for the increased involvement of the army in crime control, and Congress made legal changes to facilitate military involvement in the investigation of crime. In such a context, the research question addressed here is: what role did federal judges play in Mexico's war on organised crime? Was the federal judiciary, which is expected to remain impartial and objective, affected by the social and political context? If so, in what way or to what extent? In particular, did the federal judiciary endorse President Calderón's 'war on organised crime' and how, if at all, did this 'war' shape the practice of judging criminal cases? Alternatively, have judges been able to limit the punitive

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<sup>27</sup> Programmes and public officials' statements are described in detail in Chapter 3.

<sup>28</sup> A recent case illustrates the latter point. Mr. Alejo Garza was the owner of a ranch in the northern state of Tamaulipas. He was visited by a group of armed men who warned him he and his ranch personnel would be killed if he refused to give up all his land by the next day. Mr. Alejo decided to dismiss all the personnel and wait for the armed group. When the armed group finally showed up, Mr. Alejo received them with gunfire. He killed four gang members and injured two before being killed with a grenade. The media and opinion published on the web presented this story as a heroic reaction against organised crime. Newspapers used headlines such as: "Defends to death his ranch from the narco" and statements such as: "The last hunt of his life, Mr. Alejo surprised the group of sicarios (hired assassins) who sought to impose the law of the jungle on the ranch, the same regime which not even the power of the state has been able to control". Several music groups composed corridos, folk songs narrating the story of heroes or villains, on the subject. (Cedillo, 2010; CNN Mexico, 2010; Vanguardia, 2010).



ethos embedded in security programmes by safeguarding existing defendants' rights within the quasi-inquisitorial criminal trial?

This thesis analyses judicial decision-making in this period through the lens of 'enemy penology', and through theories of judicial behaviour and judicial roles (Jakobs, 2006; Jakobs, 2008a; Jakobs, 2008b; Krasmann, 2007). The three prominent traits of enemy penology are: first, a tendency towards pre-emptive punishment in order to prevent future harm; second, a departure from conventional procedural protections to facilitate convictions; and third, the imposition of disproportionate sanctions in the name of security (Zedner, 2010, p. 391). As a result, in this paradigm, state power expands in the name of prevention and security, based on risk rather than actual offending (Krasmann, 2007). Chapter 2 discusses this paradigm in depth.

The state's use of the army to fight crime is justified by politicians and criminal justice officials by the threat of violence from drug-trafficking groups and other criminal organisations, and by public consent for harsher responses to crime given increasing concerns for insecurity. It therefore fits within the enemy penology paradigm. Hence, this thesis aims to determine whether federal judges trying defendants charged for ordinary (i.e. not organised crime-related) offences reproduced an enemy penology approach during the so-called 'war on organised crime' during President Calderon's administration.

To answer the research question, enemy penology was used to collect and conduct initial analysis of qualitative data provided by 28 semi-structured interviews with judges, along with 27 interviews with other practitioners and 40 written judgements from two different sites. One of the sites is located in a region of the country that experienced sudden increases of drug-related violence and subsequent presence of the military, referred to here as the militarised state (otherwise referred to as the HM state). The other site had essentially an unchanged context despite the security crises and is referred to here as the less militarised state (also referred to as the LM state). I used a case study design to compare the perspectives held by two groups of judges located in these two sites, based on interview accounts and trial courts judgements.

The short answer to the research question is: no. The judiciary was found to be a branch of power where consistency and legal certainty were upheld come rain, shine or gunfire, proving to be successfully insulated from the social and political context. In both locations, however, the study also found a consistent inclination to privilege police evidence, allow high conviction rates despite poor prosecutorial performance and insufficient evidence, and impose minimum sentences. Judicial behaviour in both locations was best accounted for by drawing on the formalistic and legalistic judicial model, which understands



judicial decision-making in terms of accurate law interpretation and strict adherence to precedents, casting aside ideology, policy goals and personal attitudes. At the same time, a predominant judicial role was found which focuses chiefly on deciding the case in hand based on the dossier while disregarding any external issues.

### *Thesis contents*

Following this introduction, chapter 2 discusses the enemy penology paradigm, examining its prominent elements as well as its implications, including how the state may expand its coercive response to crime. This connects directly to chapter 3, which discusses different representations of enemy penology in the Mexican landscape, in particular security programmes, public officials' statements and criminal justice. This chapter aims to identify elements of enemy penology in Mexican legislation, criminal justice policies and official rhetoric, in order to claim that this model is advanced by the executive and legislative branches of power. Chapter 4 describes the structure of the courts and the prosecution services, as well as the way in which criminal justice proceedings are currently managed. Also, the differences and commonalities between the inquisitorial model and enemy penology are discussed here.

Chapter 5 aims to establish analytical and conceptual tools with which to understand judicial behaviour and judicial decision-making. Thus, the chapter concentrates on theories and approaches that explain judicial behaviour and decision-making. Judicial roles and orientations are also discussed, as well as the way in which precedent is formed and the politics of judicial adherence to precedent. In addition, it uses the differences between adversarial and inquisitorial criminal justice systems as conceptual frameworks within which to examine the Mexican judiciary.

Chapter 6 describes the qualitative methodology and comparative case study design used to answer the main research question. The selection of the embedded cases or sites is described as well as the boundaries and limitations of the research. Here I describe the different environments of the HM state and in the LM state, and I explain why the federal judiciary was chosen over a local judiciary, as well as the reasons behind examining only drugs offences unrelated to organised crime. I also describe the different strategies used to collect the data contained in judgements and interviews, including the difficulties encountered during fieldwork. The strategies used to conduct the analysis of each type of data are described, and the chapter explains language and ethics considerations concerning confidentiality and anonymity.

Chapter 7 contains analysis of judgements collected from both sites. I paid

special attention to arguments used by the courts to weigh evidence and reach a verdict, as well as to impose a sentence. In this chapter I highlight specific precedents frequently referenced by the courts, indicating the influence of these rulings on judicial decision-making. Findings from both sites are discussed in a single chapter to avoid unnecessary repetition, as it was found that judges in the HM state and the LM state tended to decide in a very similar manner. Finally, whether enemy penology was found in judgements is discussed, together with the subtle differences found in judgements.

Chapters 8 and 9 set out an analysis of the interview material. Chapter 8 focuses on ways in which judges understand and see defendants. It contains accounts of effective and ineffective due process principles and comments on sentencing values and practices. The general findings and comparison between HM and LM judges are discussed, as well as several themes concerning judicial behaviour models, judicial roles and judges' audiences. Chapter 9 examines judges' views on the army's participation in crime investigation and court proceedings. It examines judicial independence and impartiality in regard to several themes including insecurity and other branches of government. There is also a section to discussing inconsistencies traced in judicial opinions and a note on the judiciary's independence in the current context.

Chapter 10 discusses whether enemy penology was traced in the analyses of judgements and interviews. Also, it examines whether the judiciary endorsed or restrained the executive branch's policy on criminality as well as the judiciary's reactions to the safety crisis and other aspects of the current context. Conclusions are also contained in this last chapter, including a discussion of the thesis's contribution to knowledge, implications for policy, law and practice, limitations and final thoughts.

### *Contribution to knowledge*

Mexican socio-legal studies on the judiciary are scarce, though steadily increasing. This slow growth can be traced back to the continuing transition from an authoritarian to a more democratic regime. During the PRI regime, the Constitution was modified in ad hoc ways and the president was considered to be the final interpreter of the constitution (Ríos-Figueroa, 2012). Studies of the SCJN flourished in a context of initial political competition, pluralism and socio-economic changes, while the SCJN gained more political relevance after the 1994 reform (Ríos-Figueroa, 2012).

Judicial studies in Latin America has focused primarily on themes relating to judicial politics and to the judicial role in managing the gap between legal formalism and practice (Kapiszewski & Taylor, 2008, p. 755). Studies concen-

trating on Mexican judicial politics examine a range of themes, including how justices are elected and how this affects the courts' decisions, and how many and what type of cases the SCJN decides through instruments of constitutional review (Bustillos, 2009; Elizondo & Magaloni, 2010; López Ayllón & Valadares, 2009).

Another type of research has focused on the SCJN's role in safeguarding civil liberties. Here, scholars have focused on the jurisprudential aspects of how and when fundamental rights are protected (Ríos-Figueroa, 2012). The topics discussed by this body of work include effective due process (Magaloni & Ibarra, 2008), fairness of fiscal burdens (Elizondo & Pérez de Acha 2006), and gender perspective in the courts' decisions (Pou Giménez, 2010). The present research is situated within this second area and aims to help understand the way in which judicial decision-making is constructed, taking into account the legal and social context.

Most scholarship in Latin America, including Mexico, has focused on High Court decisions, ignoring the lower courts, even though these courts have been described as "particularly interesting candidates for additional study" (Kapiszewski & Taylor, 2008, p. 755; Ríos-Figueroa, 2012). One important study on state criminal courts was carried out by Pásara who, through a systematic analysis of case files, examined Mexico City's courts (2006). He observed the different parties involved in court proceedings and the different legal arguments used by courts, in addition to rulings that support those legal arguments used to examine evidence produced by the prosecutor and by the court and to reach a verdict. Overall he found: that the defendant, once in court, has a low chance of being acquitted; that more than one third of defendants claimed to have been mistreated; and that the pre-trial dossier produced by the prosecutor is highly influential in the final verdict, making court proceedings void as well as the principle of presumption of innocence (Pásara, 2006). This thesis draws heavily on Pásara's findings to examine federal courts' decisions. Initially, Pásara's findings were expected to be different from those reached in this thesis, based on the belief that federal justice system has more qualified personnel and better quality decisions. Nonetheless, many of Pásara's observations were corroborated during the analysis of federal criminal courts' decisions located in two different cities across the country. This shed light on structural aspects of the judiciary and helped understand judges' decisions.

Relevant studies based on surveys and interviews of state and federal judges are also scarce. Caballero and Concha explored how the judicial role was organised and performed in state courts (2001). López Ayllón and Fix Fierro examined lawyers and the legal profession from the 1970s to the beginning of the

2000s (2003). Begné focused on judges' profiles, the way in which federal justice works in the context of reforms passed after 1994 and judges' relationship with society (2007). These studies examined how judges see themselves and their role within court proceedings. Caballero and Concha, as well as López Ayllón and Fix Fierro, found that a large majority of judges maintain a legalistic mind set and see their duty as being to apply the law (2001 and 2003, respectively). In contrast, Begné found that judges see their role as not simply applying the law but also being aware of politics and social needs (2007). Concha and Caballero's work and Begné's study proved useful when analysing views and opinions from a wide range of members of the judiciary; this analysis showed that the ways in which judges see themselves and their role have remained constant over time.

Tracing the influence of both administrative incentives and administrative rules on judicial decisions is also novel within judicial studies in Mexico. One of the existing studies examined *amparo* courts,<sup>29</sup> where many suits were discarded at a preliminary stage, and concluded that this widespread practice was best explained as a strategy to manage caseloads and comply with completion rates, rather than focusing on the cases' merits (Magaloni and Negrete, 2002). In a similar way, Begné and Pásara found that hierarchical relations within the judiciary exert significant influence on judges (2007 and 2006, respectively). Hence, these studies helped when examining the internal pressures judges face when reaching a verdict.

Studies using political science to explain rather than describe judicial decisions are less common, yet there are a few that rely on a strategic model of judicial decision-making to, for instance, highlight external constraints on judges when deciding cases (Ríos-Figueroa, 2007), or the Electoral High Court's ability to redirect electoral conflict from the streets to the courtrooms (Eisendstadt, 2007). Staton used rational choice theory to examine the use of public media by the Electoral High Court and the *scjn* to influence public opinion to reinforce their independence and enlarge their sphere of influence (2010).

In addition to expanding the understanding of judges from two different locations in the judicial hierarchy, the present research also aims to contribute in regard to the methodology used to explore the judiciary's views and reactions. Although a qualitative approach has previously been used to analyse the Mexican judiciary (Begné Guerra, 2007; Caballero & Concha, 2001; Pásara, 2006), by relying on a case study design on the judiciary, the social and legal landscape is also examined. Together, these shed light on the complex image

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<sup>29</sup> The structure of courts and *amparo* petitions are explained in detail in Chapter 4.

and role of the Mexican federal judge. Enemy penology has not been used to guide the collection and analysis of judgements or semi-structured interviews. Examining court judgements and judges' views within an enemy penology approach provides a rich understanding of the way decision-making in criminal matters is constructed, bearing in mind the ways in which defendants are seen, the application of due process values, and sentencing practices. Also, exploring the judiciary within an inquisitorial tradition and a heavy authoritarian legacy through the enemy penology lens provides a different perspective from which to examine the current criminal justice system and, in particular, current judicial decision-making.

Along with the enemy penology theoretical framework, empirical methods of examining judicial behaviour were used to analyse judges' comments and views, in particular normative expectations concerning the different orientations Mexican judges have in regards to the judicial role. Whether judges understand their function as law-appliers or in a more extended way to exert some kind of influence on public policy, is examined in the thesis. More importantly, no previous research in Mexico has sought to study contemporary judicial decision-making and judicial behaviour in a context characterised by an ongoing safety crisis, harsher security programmes and profound legal and institutional reforms.



## Enemy penology: principles and implications

### Introduction

Penology is defined as the study of punishment or the infliction of harm (Reynoso Dávila, 2011). Penology unfolds in the study of the nature and goals sought by punishment, the different criteria and proceedings used to determine a punishment or sentence including the ways in which the sentence is served, and the ways in which the state's duty to impose punishment seizes (Reynoso Dávila, 2011). Traditional penologies agree in that punishment or a sentence constitutes the infliction of pain, and the divide into two main strands, consequentialism and retributivism, concerns what justifies and is pursued by punishment.<sup>30</sup> Consequentialist or preventive approaches are set within a utilitarian framework where punishment is justified if punishing one offender contributes to prevent others from offending, resulting in a safer society. The preventive approach sustains that future crime is inhibited or deterred by the believable threat of punishing criminal behaviour through physical restraint. The main goal is to achieve a safer society. One implication that follows is that the legitimacy of punishment is not questioned as long as society allegedly becomes safer (Ashworth & Roberts, 2009; Ashworth, 2009a; Hudson, 2003; von Hirsch, 2009). Different strands within consequentialism include rehabilitation where the main aim is to re-incorporate an offender to society after being treated and re-educated within prison facilities to reduce any inclinations to re-offend. Deterrence is another strand where the main concern is to persuade or deter others from offending through the punishment of an offender. By comparison, the incapacitation of offenders aims at ensuring society's safety through the offender's imprisonment.

Retribution, by comparison, imposes punishment based on the harm done and the culpability of the offender, focusing on past events. Accordingly, an offence is envisaged as causing a particular imbalance within society; as a result, punishment is morally justified as it restores the imbalance created by the

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<sup>30</sup> Extensive literature covers these general approaches, and only brief mention will be made of it here for the purpose of identifying where in the spectrum to place enemy penology.

offender (Hudson, 2003). Punishment's legitimacy stems from society's disapproval of the criminal behaviour (Hudson, 2003). Also, punishment is considered legitimate as long as it resulted from law-abiding proceedings. Retribution may be traced to Kant and Hegel who held that the punishment was inherently linked to the offence that was committed. Punishment could not be imposed based on the greater benefit that it would produce. The infliction of pain embedded in the sentence restored the initial affected right caused by the offence (Reynoso Dávila, 2011). Recent debate arose in the 1960s and 1970s, when the 'just deserts' movement shifted the emphasis from punishing outcomes to seeking a fair sanction (Ashworth, 2009b; Hudson, 2003). The just deserts approach focuses punishment on the wrongdoing and not on the offender, and sentencing is decided with close reference to principles of proportionality, leaving aside issues of crime reduction (Ashworth, 2009b).

Enemy penology is said to embody a special criminal law with a separate set of rules and theoretical assumptions that governs special type of offenders distancing them from traditional penology. Whether enemy penology is an acute version of coercive features of consequentialism or a separate model is discussed throughout the chapter. Enemy penology, or criminal law of the enemy, is a concept coined by Günther Jakobs (2006; 2008a; 2008b) who identified three main traits while analysing German legislation: first, suppression of certain procedural rights occurs in order to facilitate the convictions of those deemed enemies. So, invasive investigation tools may be used legitimately as a source of providing safety to the public in general and of reducing risk of dangerous offences taking place. Second, incapacitation of specific types of suspects or offenders who pose grave danger is available, despite the fact that the offence was not committed. Third, disproportionate sentences are imposed in the name of security (Gómez Jara-Díez, 2008, p. 531). Jakobs sought to avoid the "contamination" or infiltration of enemy penology elements into what he termed the "criminal law of the citizen", by acknowledging the existence of a "criminal law of the enemy" or enemy penology traits in specific legislation. Such duality (criminal law of the citizen and criminal law of the enemy) would allow the preservation of a democratic state, while counting with a set of legal rules embedding draconian measures to respond a particular type of offenders (Jakobs, 2006).

Enemy penology has opened the way for considerable debate among criminal law scholars across jurisdictions including the German, Italian, Spanish, Argentinian and Mexican, as well as in those with a common law tradition including the United Kingdom. (Ferrajoli, 2007; Gómez Jara-Díez, 2008; Krasmann, 2007; Polaino-Orts, 2010; Zaffaroni, 2011; Zedner, 2010). Enemy penology's thread or line of reasoning runs across criminal law categories or definitions



that criminalise anticipatory behaviour (i.e. agreement to commit an offence), criminal procedure rules that facilitate convictions (i.e. pre-emptive and surveillance orders) and criminal justice policies led by risk calculations and social anxiety, in which security may be better guaranteed through expanding the coercive arm of the state.

Some debate has focused on the accuracy of enemy penology's traits and whether these are found in applicable legislation and security programmes, such as those concerning terrorism in Spain or organised crime in Mexico (Gómez Jara-Díez, 2008; Mancera Espinosa, 2007; Polaino Navarrete, 2008). For example, in Spain, Muñoz Conde directly opposed Jakobs' theoretical framework in light of the inherent difficulty of drawing the boundary between being a civilian offender from an enemy offender. In his view, this ambiguity leads to the lawful use of coercive measures contained in a set of rules geared to deal with the enemy (whoever that may be) defined conveniently by those in government (quoted in Reynoso Dávila, 2011). In a similar way, Reynoso Dávila points out with concern that the legal regime to prosecute and sentence suspects for organised crime offences in Mexico evokes Jakobs' ideas which enhance invasive measures for the purpose of crime control, casting aside the rule of law and constitutional protections (2011).

Whether the enemy penology model is merely descriptive or embodies a prescriptive agenda has been widely debated also. Such discussion was driven by Jakobs' inconsistency, as he has maintained at different times that enemy penology was purely descriptive, while advancing its normative utility (Ferrajoli, 2007; Gómez Jara-Díez, 2008; Jakobs, 2008; Krasmann, 2007; Mancera Espinosa, 2007; Polaino-Orts, 2010; Zaffaroni, 2011). Ferrajoli sustained (2007, p. 10): "The birth certificate of enemy penology lies in the political legitimisation of punitive practices such as the policies against terrorism conducted by the American government".

Various scholars have examined the effects of enemy penology. For example, according to Krasmann, enemy penology is more than "legal regulation on exclusion" (Jakobs quoted by Krasmann, 2007: 302); it offers guiding concepts to develop security policies (2007, p.302). Enemy penology consists of a security paradigm that legitimises reacting to the prospect of dangerous or other offending behaviour, both as a means of prevention and pre-emptive crime control (Krasmann, 2007). An enemy penology approach enables a "general extension of authority in the name of prevention and security" (Krasmann, 2007, p. 302). In this regard, for instance, Ferrajoli (2007) argues that enemy penology features have flourished in security programmes such as that focused on terrorism developed by the American government where the infliction of punishment is



based on who the suspect is, as opposed to what he allegedly did, and draw on criminal proceedings to fight terrorist criminality as opposed to seeking the truth of the matter or letting the parties prove their case.

According to Zaffaroni, Jakobs suggests enemy penology to be an alternative regime aimed at enemies in which the state's response is justified by a limited idea of necessity to address these enemies (2011, p.169-174). In contrast, according to Krasmann, enemy penology cannot be thought of as an alternative set of rules. She sees it as a wider programme that includes policy-making, because its conceptualisation of offenders and crime control policies is represented not only in laws but also in policies. In addition, such conceptualisations are heightened by rhetoric, mass media, and social and cultural ideas. As this chapter's discussion will show, Jakobs's enemy penology model has prescriptive resonance, providing those in power a justification for increasing punitive responses aimed at a special type of crime. Also, its resonance may be due to the constant overlap with particular approaches to punishment, offending and security. The core elements of enemy penology will be unpacked starting with the discussion on defining the enemy, followed by the discussion on procedural safeguards and punishment. Also, implications for criminal justice will be discussed, including a strong emphasis on the crucial role of the judge, in order to set the essential framework to be used in subsequent chapters.

## Offender vs enemy

The conceptualisation of offenders has varied through time, encompassing considerable thought and research on deviance, touching upon issues of free will or predetermined inclinations to offend. In a similar manner, the idea of 'the enemy' is the focus of much scholarship on international laws governing armed conflict, including the laws of war and humanitarian intervention. The purpose here is to examine Jakobs' conceptualisation of the enemy and to discuss the intended and convenient ambiguity of equating offenders with enemies of society.

### *Jakobs' enemy*

Enemy penology is aimed at 'fighting' particular offenders linked to serious offences, such as sexual offences, economic crime, terrorism, illegal drug trafficking and other types of organised crime, where the distinction lies in that they have distanced themselves possibly in a permanent manner from a society governed by law. This assessment is based on specific attitudes (linked to sexual offenders), economic life, (concerning economic delinquency) or involvement in a

criminal organisation (regarding organised crime offences) (Jakobs 2006, p.53-54). “Said through an example: who continuously behaves as the devil, at least he cannot be treated as a person within a legal regime as in to the confidence that he will honour his duties” (Jakobs, 2006, p. 53). An enemy, within Jakobs’ paradigm is someone who has forfeited his rights because of his dangerousness and his failure to comply with legal norms (Zedner, 2010, p.392). Enemies are persistent and incorrigible criminals who not only threaten public safety but, more importantly, challenge the entire social and legal order (Krasmann, 2007, 303).

Jakobs advances that there are two different types of offenders: on the one hand, the generally law-abiding citizen who may occasionally offend and on the other, the enemy who has an inclination to offend as a way of life. The former is subject to the criminal law of the citizen, while the latter is subject to the criminal law of the enemy. An offence committed by an ordinary offender, as opposed to an enemy, is visualised as an act of disregarding the law (within which he usually abides), and as a symbolic message of rejecting the system. The rejection of the law, represented by the offence, affects society’s expectation of the applicability and validity of the law. Hence, the state’s imposition of punishment seeks to reassert to both the offender and the rest of society its confidence in the applicability and validity of the law. In this dialogue, punishment focuses on reasserting the validity of the law (Polaino-Orts, 2010b, p.118-119). An offence committed by an enemy is conceived as means of creating danger rather than a symbolic message of disregarding the law. The distinction lies in the fact that an enemy lacks the ability to act according to social norms and is indeed deemed disloyal to them. The enemy is considered a source of danger, neither sharing nor understanding social norms, and for this reason he is not to be communicated with but rather fought against (Jakobs, quoted in Polaino-Orts, 2010b, p.121; Dubber 2010, p.203-211).

The concept of the enemy may be traced to the Roman concept of *hostis* (Zaffaroni, 2011, p.23). The *hostis* were foreigners or those strange to a community, with whom communication and understanding was not feasible. Using the *hostis* category allowed the lawful to treat some people differently (Zaffaroni, 2011, p.23). Foreigners or *hostis* not only looked different but were considered inferior and deemed incapable of self-government; they could only be governed (Dubber, 2010, p.193-194). Furthermore, those declared by the authority as *hostis judicatus* were political enemies, dissidents who threatened the Republic’s stability. Those declared *hostis judicatus* were left in a similar condition to slaves, subject to sanctions that were not applied to citizens (Zaffaroni, 2011, p.24-25). The advantage of treating specific offenders as foreigners or enemies in Jakobs’ paradigm is the legitimacy to unleash a set of state responses

which are particularly aggressive and otherwise available only in a setting of a war waged against aliens. The enemy treatment is based on the hostis' alleged lack of understanding of legal norms. Members of organised crime groups, either nationals or foreigners, are deemed enemies not in light of their nationality but due to the risk they pose to society and to their rejection to legal norms.

Zaffaroni and Dubber claim the concept of hostis has remained within penal thought, along with the duality of treating some offenders as "equals" and others as strangers or enemies (2011; 2010). Similarly, Weber and Bowling point to the continuing impulse to exclude itinerant groups cast as outsiders or unwanted, not only from physical territory but also from the legal protections reserved for the welcome and insiders (2008, p.358-365). Based on religious, political or philosophical justifications, ideas such as "incorrigible offenders", dissidents or dangerous classes of offenders persisted. Policy makers and government in general have used these labels to justify their exclusion from society by deportation, life imprisonment or death penalty (Pratt, 2000; Zaffaroni, 2011, p.87-114). It is foreseeable that the enemy category advanced by Jakobs may be enlarged to include other types of offenders. Problems arise regarding the threshold for shifting from "citizen" treatment to "enemy" treatment. Is the threshold clear? Who is the enemy, and how is he to be identified among regular offenders? Scholars including Gómez Jara-Díez (2008) and Rutherford (1997) have argued that enemy penology rules have led to an expansion of enemy status to encompass a wider range of offenders, due to the problem of adequately distinguishing ordinary offenders from dangerous or enemy ones, and also to the slippery and flexible labels of dangerous and risk.

### *Expanding criminalised behaviour*

One way of dealing with enemies is to extend the scope of criminal legislation to include, for example, acts of preparation to allegedly offend, such as terrorism, or guilt by association, acts which in themselves have not caused any harm (Cancio Meliá, 2008; Cole, 2003, p. 58-64; Zedner, 2009, p.117). For instance, conspiracy merely requires evidence of an agreement to commit an offence with some overt action; thus it can be used as the formal basis for arresting and holding opposition movement leaders conveniently labelled as enemies (Hadden, 2000, p. 212). Similarly in Mexico, preparatory acts and mere intentions to offend are sufficient grounds to process the suspect for an organised crime offence.<sup>31</sup> As a result, for example, the act of smuggling a particular drug may not have taken place but charges can be pressed if the prosecution considers three

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<sup>31</sup> Article 2 of the Federal Law against Organised Crime.

people were organising with the intentions to smuggle the drug. Whenever a judicial ruling has established the existence of a particular criminal organisation, the prosecution may indict a suspect for participation in organised crime simply by establishing a link between that person and the criminal organisation, because proving or disproving the actual agreement to offend is particularly difficult (Hadden, 2000).<sup>32</sup> As a result, the actual offence may not have taken place but the suspect, based on the linkage to the criminal organisation may be indicted and punished. The rationale, according to Jakobs, is to restore the imbalance created by the threat of the offence through the incapacitation of possible offenders (2006).

### *Dangerousness and risk*

The “dangerous” label has been a concern examined within penal thought for a long time. The type of men deemed as degenerate or biologically deficient were on the lower end of the social scale, as men could be of better or worse quality. The worse type of men were thought of and labelled as dangerous by those in power or considered as genetically superior (Ferri quoted by Reynoso Dávila, 2011). The dangerous ones were labelled based on their personality rather than on the offence charged or that thought they might commit (Ferri quoted by Reynoso Dávila, 2011). The dangerous type needed to be controlled pre-emptively in light of their apparent non-adaptation to social life, as posed danger to society (Ferri quoted by Reynoso Dávila, 2011 and Zaffaroni, 1998). The assessment of dangerousness was necessarily linked to society’s perception of risk posed by individual offenders and society’s urge to defend itself from them (Zaffaroni, 1998). In practice, risk has proved to be difficult to predict and when used tends to generate non-accurate results (Zedner, 2005; Coyle & Halon, 2013). Nonetheless, risk has become a guiding principle of crime control policies which has led to disparate and conflicting responses to criminals, largely due to different understandings and calculations of risk (Zedner, 2009).

Sentencing illustrates the tendency for the state to extend a coercive response when faced with vague legal categories applied to offenders associated with dangerousness and risk. For example, the United Kingdom’s Criminal Justice Act 2003 introduced extended or indeterminate sentences for sexual and violent offenders (Ashworth, 2010; Heberton & Seddon, 2009). To decide if the defendant merited a particularly harsh sentence<sup>33</sup>, courts were required to predict the risk

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<sup>32</sup> Article 41, 3rd paragraph of the Federal Law against Organised Crime.

<sup>33</sup> Dangerousness sentences could be: imprisonment for life, imprisonment for public protection or extended sentences.

of the offender committing further specified offences and the risk that such offences would cause serious harm to members of the public. However, the courts appeared to apply this type of sentence extensively to both serious and minor offences (Ashworth, 2010, p.228-235). Although the Act was amended in 2008 in order to restrict the wide application of this sentencing policy, courts were still required to assess and predict the level of risk each “dangerous” offender poses and despite that risk prediction has been widely described to be difficult and with high rates of error (Ashworth, 2010, p.233-236; Coyle & Halon, 2013).

The difficulty of distinguishing serious from minor offenders may be mirrored in practice when many if not all offenders are dealt with in a harsher way. As Heberton and Seddon suggest, in assessing dangerousness or risk of serious harm to the public, the propensity to increase a coercive response is a safer choice made by the state when assessing danger or risk. This propensity is justified by holding that society is said to be safeguarded from possible risks (2009, p.348).

### *Enemies and social panics*

The label of dangerousness to describe enemies is conveniently flexible and easily manipulated so as to fit to social panics and public anxiety. ‘Suitable enemies’ has proved to be a useful term, used mainly by those in power to pursue a particular war against those selectively labelled and portrayed as dangerous (Christie, 1985). Those in power use a preventive-based discourse that highlights the idea that society is at high risk of harm in order to adopt tough measures against those categorised as enemies. Further, while referring to terrorists, sexual predators and career criminals as enemies, certain groups are demonised and their conduct is portrayed as evil or inhuman (Garland, 2001, p. 135). As a result, enemy penology is concerned with ‘enemies’ as moral wrongdoers, locked into an alien and threatening category (Cancio Meliá, 2011, p.116). It is unclear to what extent the enemy category applies to all kinds of serious offenders or is limited to extreme variants such as members of violent drug trafficking organisations and terrorists. President Calderón, for example, described that enemies commit different kinds of offences as he publicly said:<sup>34</sup> “Mexico’s enemy is one who extorts, robs, kidnaps, claims rights that are not deserved and poisons our youngsters. We do not have any reason to tolerate him.”<sup>35</sup>

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<sup>34</sup> Chapter 4 provides a systematic analysis of speeches given by presidential and other high profile characters about the war on organised crime aiming to show clearly that government officials encourage – very explicitly – the idea that armed drug criminals should be seen as enemies.

<sup>35</sup> Press conference of President Calderón on December 23, 2010 in Morelia, Michoacán, consulted in La Crónica: [http://www.cronica.com.mx/nota.php?id\\_notas=551569](http://www.cronica.com.mx/nota.php?id_notas=551569)

It is difficult to claim that theft and drugs related offences pose the same kind of danger. Some criminal organisations made notorious efforts to prove their violence and firepower through overt messages to authorities and rivals shown across Mexico (Shirk & Wallman, 2015). The image of strong, vigorous harm doers helped justify a response in Mexican law-enforcement agencies who resorted for tougher measures to contain them (Bailey & Chabat, 2002). Whether petty offenders also equated as enemies by President Calderón received the same treatment as those involved in drug violence was a main enquiry pursued in this Thesis.

As illustrated by Calderón's statement, the 'enemy' label evokes emotional and ideological rejection by society, while those in power use this label typically against political dissidents, legitimised to create state responses which draw on mechanisms used to wage war (Gracia Martín, 2005). As Christie argues, these enemies, tailor-made for a state's particular war are portrayed as being so dangerous that those fighting them can ask their own nation for absolute loyalty and demand extraordinary powers (1985, p.43). Additionally, the alleged risks coupled with a fostered perception of society's powerlessness by those in power reinforce the claims for a stronger state response (Garland, 2001, p. 135-136). The category of enemy at the core of the enemy penology model draws on the collective image of evil and inhuman offenders. Those in power resort to vigorous and tough response to enemies, enabled by social anxiety and emotional reactions experienced by the general public.

## Diminished procedural rights

In democratic states, allocation of punishment and guilt is thought to be legitimate in principle because it was not decided arbitrarily. Punishment should not be imposed if the suspect did not have a fair trial, including the right to a legal defence, the right against self-incrimination and, most importantly, the right to being presumed innocent until proven guilty. In addition to safeguarding due process rights, punishment should not be meted out if the prosecution fails to prove its case. Such high standards and guarantees seek to avoid wrongful convictions.

Consequentialists consider that punishing the innocent is undesirable but may be necessary to maintain public safety and reduce offending, while retribution holds that the moral standards of criminal justice institutions must be maintained so that the inflicted punishment is morally legitimate (Ashworth, 2009). This divergence is also reflected in Packer's models of crime control and due process. At the risk of oversimplification, Packer's due process model seeks the conviction of the guilty but holds the integrity of procedural rules that

govern the trial as paramount. Defendants' individual rights are protected by due process principles enforced in court proceedings. Hence, the state power is constrained by law-abiding standards, even if compliance to these standards compromises conviction rates. Ultimately, law-abiding behaviour is a moral condition which state officials must comply with to carry out law-enforcement (Sanders, Young, & Burton, 2010). By comparison, Packer's crime control model focuses on achieving a high rate of detection and conviction of offenders in the face of limited resources and high levels of crime (Sanders, Young, & Burton, 2010). Safeguards against miscarriages of justice are considered necessary to ensure confidence in the system, but protecting due process rights are secondary concerns (Sanders & Young, 2007). Ultimately, this model prioritises the conviction of the guilty, while accepting that a few number of innocent defendants may be wrongfully convicted (Sanders, Young, & Burton, 2010).

Enemy penology overlaps with the crime control model as it argues in favour of lowering the standards of procedural safeguards in order to incapacitate possibly dangerous offenders. Nonetheless, while the crime control model aims at convicting the guilty, the ultimate aim sought by the enemy penology paradigm is to prevent dangerous offending. Jakobs held that enemies opt out of ordinary criminal procedure rules in light of their disregard to the law. A different set of rules is applied to those who are no longer governed by a "presumption of being law-abiding" (Jakobs, 2006, p.55-56; 2008b, p.36-37). As enemies are reduced to being mere sources of danger, their incapacitation is sought over enforcing procedural safeguards in trial. The high degree of risk of offending is determined based on both the harm that it presents to society and the likelihood of the harm occurring. Incapacitation of enemies is legitimate and justified by the overarching aim of avoiding harm. Enemy penology also overlaps with the Mexican quasi-inquisitorial criminal justice system. These overlaps are addressed in Chapter 4.

Jakobs' contention resonates with Nigel Walker's argument that advocated for precautionary custodial detention. According to Walker, non-convicted people should be presumed harmless (1994). However, when a person was convicted for seriously harming others, the presumption of harmlessness was waived and as a result, he or she could be held longer on the basis of risk posed to others. Also in cases where people had not yet done any harm but expressly declared their intentions to do so, they forfeited the protection of presumption of harmlessness and could be subject to preventive detention or incapacitation. Walker argued in favour of precautionary practices but also argued in favour of offering humane living conditions to the person staying in custody. After all, that person is being detained "not because he deserves it, or for longer than he deserves, but



solely for the sake of other people's safety" (Walker, 1994, p. 190). This stands radically distant from Jakobs' conception of punishment of enemies.

It appears that enemy penology may be observed in cases where rights are partially or fully suppressed (Gómez Jara-Díez, 2008). Organised crime suspects in Mexico have diminished procedural rights becoming subject to longer pre-emptive detention periods, intervention of private communications and seizure of assets. In trial, admissible evidence includes testimonies of unidentifiable witnesses, admission to accomplice evidence, and that produced by entrapment and other investigation tools (Brucet Anaya, 2007). Also, evidence standards are lowered enabling judges to reach (guilty) verdicts based only on indications, namely not direct or conclusive evidence (Moreno Hernández, 2011). Validating a reduction in rights may be the first step towards annulling them altogether, as observed in the American war on terrorism.

Some suspects of terrorism in the U.S. were labelled as "enemy combatants" by the American government. This enabled their transfer from civilian legal jurisdiction to military jurisdiction, where they could be held indefinitely, without charge, court appearance or access to defence counsel (Cole, 2003, p.39). The practice of various forms of torture on enemy combatants was openly used to obtain information, confessions and to generally enhance intimidation (Ferrajoli, 2007). The term "combatants" as well as declaring war on terrorism draws on the laws of war. Similar to Jakobs' enemies, prisoners of war may be imprisoned, captured or even killed without much proof. Attacking enemies within a law of war regime is deemed legitimate in light of the harm they might inflict, even if they have not yet done anything (Luban, 2002). Enemy combatants however were not offered the rights entitled to prisoners of war who, according to the Third Geneva Convention have the right to not be threatened, insulted, or exposed in any way if they refuse to answer. A prisoner of war, once he is rendered harmless through injury or surrender, cannot be punished for participating in the war (Hadden, 2000; Luban, 2002). Enemy combatants were treated as criminals subject to criminal proceedings where can be punished, but were offered no procedural rights either. Guantánamo Bay prison became a sort of limbo wherein suspects for terrorism, visualised and explained as sources of risk, were unlawfully and indefinitely detained without charge, for the sake of preventing future harm. According to Luban (2002, p. 10):

By selectively combining elements of the war model and elements of the law model, Washington is able to maximize its own ability to mobilize lethal force against terrorists while eliminating most traditional rights of a military adversary, as well as the rights of innocent bystanders caught in the crossfire.



## Conceptualisation of punishment

Is punishment within an enemy penology scope different to traditional penological strands of consequentialism and retribution? How is punishment to enemies different from current punitive practices?

### *Jakobs' punishment*

While drawing on both preventive and retributive approaches, the duality between citizen and enemy implies, according to Jakobs, two distinct forms of punishments with entirely distinct sets of justifications (2006). Punishment of citizens, as retributive penology argues, aims to repair the imbalance created by those who break the law through reasserting society's confidence in the validity of social norms (Jakobs, 2006; Reynoso Dávila, 2011).<sup>36</sup> Punishment in general attempts to send a symbolic message to law-abiding society that norms are applicable and valid (Polaino-Orts, 2010, p.84-85). Stringent treatment of enemies is justified by the claim that they jeopardise the validity of the legal system and reduce citizens' trust in the effective enforcement of the rules. As a result, punishment symbolises rejection of the non law-abiding person while preserving society's trust in and compliance with the legal system. Retribution is also interested in emphasising that criminal behaviour is rejected and so society's rights are restored through the offender's punishment. Accordingly, punishment of enemies does not involve any sort of communication with him but rather his mere incapacitation. Due to the risk enemies pose to society, they do not merit treatment as a regular person within a legal regime. The punishment of enemies seeks to reassert the validity of the law to society while nullifying any sort of communication with the enemy (Jakobs, 2006). A violent response from the state, either in the form of a severe sentence or pre-emptive incapacitation is justified because enemies are sources of danger and society's safety and elimination of risk are primary concerns (Polaino-Orts, 2010). According to Jakobs, the severity of the sentence does not aim to be proportional in regard to the actual offence, but rather aims to be proportional to the degree of present and future risk (2008b, p.34).

Although Jakobs holds that enemies cannot be communicated with, it is difficult to argue that stringent punishment fails to express exclusion and segregation to those deemed enemies. At the same time, certain forms of severe punishment of ordinary offenders –deemed as civilians– overlap with punishment of enemies. It may be argued that the exclusion and elimination of the enemy sits

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<sup>36</sup> Vigencia de la norma in Spanish.

easily with current regimes, in particular with incapacitation. On the one hand, punitive practices involve stringent imprisonment which have no rehabilitative or reintegration goals, given that welfare benefits for training or leisure are seen as better spent on the law-abiding. Incapacitation regimes amount to warehousing and close surveillance of prisoners because of the risks these offenders represent to society (O'Malley, 2001, p.176-7). Practices such as solitary confinement and banishment, as well as extrajudicial executions and legalised torture, are consistent with enemy penology, where exclusion becomes ultimately elimination from social participation or even extermination (Krasmann, 2007, p.311).

The underlying goal of stringent sentencing is a vigorous state, a paternalistic “preserver of order” with license over severe sanctions, including punishment and pre-emptive controls (O'Malley, 2001, p.186). Similar to severe forms of incapacitation, the enemy penology paradigm aims to solve problems by removing troublesome or disagreeable people with methods which are lawful and widely supported (Rutherford, 1997, p.117). Enemy penology's distinct feature is that enemies, however defined, are and will not ever be treated citizens and so merit no legal protection against state powers that citizens have. Enemies are punished with the aim of eliminating the grave risk they present so rehabilitation or reinsertion ideas do not apply as their re-incorporation to society is not sought. Punishment of enemies under Jakobs' model has been said to be notoriously disproportionate (Gómez Jara-Díez, 2008; Krasmann, 2007; Mancera Espinosa, 2007; Zedner, 2010). Does the judiciary have any margin of discretion under an enemy penology regime advocated and applied by other powers of government? In practice, to what extent has the judiciary enacted enemy penology through sentencing, either to terrorists in Spain, to organised crime suspects in Mexico, among others? Furthermore, once an enemy penology model is introduced in a country's legal system, such as special legislation to punish organised crime offences in Mexico, to what extent if at all, has ordinary or civilian penology suffered any contamination? These questions form the underlying thread of this project.

## Implications of enemy penology: within or without the rule of law

Traditional and enemy penology stand at the poles of one regime, where society can reasonably expect that the law will be enforced and that the state will act against those who disregard the law. Civilian or enemy are categories linked to dangerousness, rather than nationality. The scope and boundaries of enemy penology are set by necessity, namely, what sources or danger need to be contained and incapacitated (Jakobs, 2008). According to Jakobs, enemy penology

does not compromise a democratic state (Polaino-Orts, 2008). Enemy penology exists within a rule of law regime on the basis of an exception justified by necessity. However, the sustainability of this paradigm within a democratic regime may be highly contested due to considerations of unequal treatment and the authoritarian regime underpinning an exception regime, as discussed below.

### *Different treatment before the law*

Sustaining criminal convictions that derived from unfair proceedings raises questions of compliance with the rule of law. Under the rule of law, both the state's exercise of power and citizens' pursuit of interests are limited by the law (Nelson & Cabatingan, 2010). The main components of the rule of law are equal access to justice, equal treatment before the law, and the absence of arbitrary abuse by authority (Shirk & Ríos Cázares, 2007; Weingast, 2010). Treating all citizens in accordance with basic principles of fairness, while ensuring equal treatment, is integral to enforcing a rule of law regime (Carothers, 2009). Enemy penology fails to honour equal legal treatment as the differentiated treatment of offenders, some labelled as citizens and others as enemies, directly contravenes an essential component of the rule of law. The definition -and subsequent treatment- of enemies serves as a threshold that authorises waiving procedural protections against arbitrary uses of power by the government.

The political idea of citizenship distinguishes between those within the state, enjoying certain privileges and immunities, and those at the border or outside, who do not enjoy those privileges and immunities (Dubber, 2010). The implications of treating some as citizens and others as non-citizens have long spilt over those at the border of citizenship on the basis of ethnic and economic marginalisation (Zedner, 2010). The dichotomy between law-abiding citizens and enemies overlaps with the application of a separate criminal justice system for non-citizens, such as immigrants and asylum seekers, who face harsher sentences and elimination in the form of deportation (Fekete & Webber, 2010). Hence, while offenders labelled as enemies are said to have waived their rights because they disregarded social norms, other non-citizens are required to prove their law-abiding behaviour or disprove their guilt, because they are likely to be prosecuted (Weber & Bowling, 2008; Zedner, forthcoming). Unequal legal treatment for law-abiding citizens and enemies provides justification for “othering” certain populations, while using proactive and aggressive measures that maintain differentiated responses to outsiders from insiders (Cole, 2003; Fekete & Webber, 2010; McCulloch & Carlton, 2006; Weber & Bowling, 2008; Zaffaroni, 2011).

Within the scope of enemy penology, the legal treatment of enemies is portrayed as legitimate because it allegedly protects society. To maintain trying and sentencing enemies based on applicable legal framework may accomplish a preservation of the state's legitimacy to punish. Nevertheless, creating and subsequently using such an unequal legal framework raises important questions of fairness. It is difficult to sustain the notion that those who were offered diminished safeguards for a fair trial and had to face an initial presumption of guilt, were rightly convicted and punished. The attempt to apply such an unfair criminal process while relying on legal norms may uncover the convenient states' rule with law, as opposed to the state being bound by the rule of law (Bowling & Sheptycki, 2011).

### *A state of exception*

Within an enemy penology model, a state's response to crime control is based on what constitutes an 'enemy' and the need to fight him, as determined by those in power. The state's own understanding of necessity sets its own limits in a timely and convenient fashion, as opposed to acting within pre-established limits. Responding to an enemy is used as the justification to address a necessity, aiming to increase the state's coercive. When a state's actions are justified in terms of necessity rather than within the limits of law, an exception regime or a state of exception is triggered where particularly arbitrary powers are used and special rules are enforced, leading to an authoritarian regime (Gracia Martín, 2005; Zaffaroni, 2011, p.169-174)

A state of exception, according to Agamben (2005), encompasses a blurred "zone of indifference" between actions inside or outside the legal system. The idea of necessity is an essential threshold in a state of exception, and at the same time it encompasses an opportunistic and ambiguous license to increase state's power. Agamben argues that a necessity, on the one hand, has been claimed by others to be as important as law, making anti-juridical de facto proceedings pass over or become law. On the other hand, necessity justifies a single case – the exception- of transgression of the legal system, hence, law is exceptionally suspended and annulled in fact (Agamben, 2005, p.25-29). Whether necessity creates legal grounds for the state's actions, or justifies the state's breach of the law, is both arguable and usefully ambiguous for those declaring the state of exception caused by the need to address enemies. Laws ruling emergency powers build on the state of exception.

The enemy penology paradigm draws on such ambiguity and embodies a way of legitimizing the exception (Krasmann, 2007). The ubiquitous risk to public safety is claimed as the necessity legitimising state action without legal

grounds. While the government claims to be applying the law, it is in fact exerting violence based on the declared state of exception (Agamben, 2005, p. 87). It is the government in power which assesses such necessity, and in consequence, the selection of enemies is unrestricted (Zaffaroni, 2011, p.172). As McCulloch & Carlton argue: “Pre-crime regimes necessarily involve a high degree of discretion in interpretation of data and give wide latitude to law enforcement, security agencies and executive government” (2006, p.404).

The need to address dangerous criminality, such as that highly organised and equipped similar to an army, is the main justification for a differentiated treatment amongst offenders used by the Mexican government. A state of emergency has not formally been declared. Nonetheless, as the legal category of organised crime is ambiguous it may be wrongfully applied to a wider range of offenders. Hence the enemy treatment consisting of severe and disproportionate state response may be applied to an increasing number and type of enemies, depending on the occasion and political convenience. Ultimately, those in power are who determine there is a necessity to respond more coercively to enemies.

During emergencies there is a clear tendency for state security forces to not only take full advantage of any lessening of safeguards for suspects (the category of enemy is easily adaptable to different contexts) but also to resort to extra-legal action to avoid any legal restraints on putting those suspected of anti-government activity behind bars or otherwise eliminating them (Gómez Jara-Díez, 2008; Hadden, 2000, p. 211). Similarly, special legal provisions make it difficult for members of state security forces to be tried or convicted for unlawful activity of this kind. As Cole claims in the context of the so called war on terror: “Physical liberty and habeas corpus survive only until the president decides someone is an enemy combatant” (2003, p.18). An emergency or exception allows an extension of the state’s use of force, based on opportunistic definitions and categories.

It may be argued that, as Gracia Martín points out, enemy penology encompasses an exception regime, based on necessity, in order to validate the state’s power to wage war against those labelled as enemies (2005). Similarly, Krasmann has asserted that the enemy penology paradigm enables the state to act outside the law for the purpose of preserving security (2007, p.302). Enemy penology becomes a compelling argument for increasing the state’s power to intervene in response to an alleged risk rather than actual criminal offending (Krasmann, 2007, p.303-4).

## Exploring enemy penology in practice

The enemy penology model overlaps with the continuous promise of safety said to be provided by public officials, politicians and private actors, despite the fact that it is broad and difficult to pin down (Zedner, 2009). Security's inherent ambiguity becomes a form of licence for those deciding what causes insecurity and what measures need to be taken in response. In addition, promising security in the face of constant threats has the collateral effect of generating awareness and anxiety (Zedner, 2009, p.10). Promising security in the face of ever-present danger, takes advantage of popular penology (Zedner, 2010, p.390), while ensuring legitimacy for the use of state violence (Krasmann, 2007, p.309).

### *Responding to ubiquitous harm*

Law-enforcement agencies, when forced to distinguish 'ordinary offenders' from those defined as dangerous, appear to expand their powers of investigation and intervention (Zaffaroni, 2011). Such is the case of the framework of combating the financing of terrorism in places such as Australia, where bank accounts and property may be seized, based solely on suspicion. As a result, people who are linked to activities unrelated to terrorism, such as giving money to a charity or social cause, are investigated (McCulloch & Carlton, 2006).

An illustration of the enlargement of powers is the expanding use of technologies and devices for crime control purposes. Bowling, Marks & Murphy identify the use of a wide range of tools with different goals, including surveillance and investigation (2008). For example, in order to provide security and prevent crime and disorder, surveillance applications were first used to observe specific individuals but their scope was extended until everyone was under surveillance (Bowling, Marks, & Murphy, 2008, p. 56; Zedner, 2009). As McCulloch and Carlton point out: "The shift to future crime, pre-crime or pre-emptive strike regimes in criminal justice necessarily involves massive levels of surveillance" (2006, p. 403). Surveillance is carried out through cameras, listening devices, chemical sensors, social networks, financial transaction monitoring and public transport use, leading to increased intrusion (Bowling, Marks, & Murphy, 2008, p.62-63; Heberton & Seddon, 2009).

Investigating particular crimes has also led to expanding the use of different ways of intervening, both before and after an offence. Returning to the Australian example of the investigation and punishment of terrorism, it has become common practice to freeze and confiscate assets without conviction, charge, or indeed without a single piece of evidence (McCulloch & Carlton, 2006). Interventions range from property and physical search and seize practices to extend-

ed custody detention. The powers of law-enforcement agencies have even meant that legal constraints are interpreted aiming to authorise further intrusion. For instance, in the case of *Kyllo v United States*,<sup>37</sup> the court interpreted the concept of search in order to validate the use of thermal imaging within the suspect's home, which was believed to contain high-powered marijuana-growing lamps. The court held that the thermal imaging did not amount to trespass because there was no physical intrusion. As a result, the court validated the invasion to the suspect's home (Bowling, Marks, & Murphy, 2008, p.64).

At other times, enlarged powers have led to a systematic breach of laws. For example, the (Mexican) National Commission of Human Rights (CNDH) has repeatedly urged police and military personnel not to carry out unlawful property searches, which generally include the use of physical violence against the occupants, under the justification of the investigation of serious organised crime (CNDH, 2011).<sup>38</sup>

The presence of dangerous criminality such as organised crime in Mexico, and terrorism in Australia or Spain, has justified different operatives and strategies used by law-enforcement agents on the wider population that don't present the same danger to society as those 'dangerous ones'. The notion that harms are created by the very measures taken to alleviate criminal justice problems refers to the iatrogenic effect (Bowling, 2011). Harms may involve visible violations of privacy and liberty, as well as producing new kinds of unsafety and violence. Anti-drugs efforts carried out in Mexico as many other countries have brought an increase in violence and in an expansion of criminal organisations and illicit activities. The comparison with clinical iatrogenesis seems appropriate where doctors administer drugs or perform unnecessary procedures on patients, inflicting pain and creating greater harm (Bowling, 2011).

### *Precautionary logic*

Enemy penology overlaps with what has been called precautionary logic, in which everyone must act in response to risk by following warnings, being suspicious and embedding security measures in everyday life (Hebenton & Seddon, 2009). The precautionary approach informs policymaking, which is mainly driven by the prevention of threatened harm, though such harm is unknown and incalculable (Zedner, 2009, p.83). The precautionary approach urges radical precautions, expanding from targeting and profiling individuals to placing everyone under

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<sup>37</sup> *Danny Lee Kyllo v United States* 533 US 27,121 S Ct 2038, 150 L Ed 2D 94, 2001 US LEXIS 4487. Reference consulted in Bowling, Marks, & Murphy, 2008, p.64.

<sup>38</sup> The National Commission of Human Rights is a public agency in charge of promoting and defending human rights. The issue of unlawful property searches is discussed in Chapter 4.



surveillance, as all citizens are possible sources of danger or threat (Zedner, 2009, p.84; Hebenton & Seddon, 2009, p.345). Hence, full scientific certainty or evidence is not required before carrying out pre-emptive measures (Zedner, 2009, p.84). This is not to say that expert knowledge is unnecessary but, in the face of uncertainty and universal risk, the process of decision-making allows little time for reflection, tending to amplify the scope of measures used, overreaching people who possibly may be dangerous (Hebenton & Seddon, 2009, p.345).

The pressure on governments to act preemptively against potentially catastrophic, though incalculable, risks has contributed to blurring the line between public safety within the scope of criminal law, and security drawing emergency legislation and the laws of war (Zedner, 2009, p.116-117). In response to the emergency driven by terrorism and serious organised crime, state powers grow, as do budgets and resources, extending the scope of criminal legislation to include behaviour which fails to produce any harm.

At the same time, mass violence by heavily armed offenders equipped for battle can only be counterbalanced with an equally violent response. When violent encounters between material enemies and state officials lead to an increase of violence, including mass murders, how should blame be allocated? Furthermore, how can the preventive ethos be advanced when harm is not reduced but rather increased? As Chapter 3 will show, the former Mexican President gave a vivid example of a possible response. According to President Calderón, those affected by the encounters between state officials and organised criminals were most likely to have been involved in illegal activities (Human Rights Watch, 2013).

### *Securitisation*

The ongoing process of securitisation entails widening the scope of national security matters, encompassing transnational issues such as drug-trafficking, migration and economic instability as well as poverty and the maintenance of order (Bowling & Newburn, 2006, p. 11-12; Moloeznik, 2009). Also, issues which were previously dealt with internally by policing become part of the new national security agenda, involving new actors, including non-state parties such as transnational agencies and the private sector, as well as state actors such as military forces (Bowling & Newburn, 2006, p. 129). Identifying widespread social problems as risks and threats, and blurring internal and external security matters, justify and enable an invigorated criminal justice response and subsequently excessive use of force.

Enemy penology and the new security agenda converge in stressing the use of force and threat of violence as ways to solve problems through more sophis-



ticated and invasive means. Further, the precautionary logic draws on the use of national security to advance pre-emptive measures, using intelligence and surveillance, while taking advantage of the inherent secrecy of these measures and lack of oversight (McCulloch & Carlton, 2006).

### ***Militarisation***

Securitisation may happen in parallel to militarisation where the police and the military collaborate closely. As a result, activities such as targeting suspicious vehicles or individuals who are supposed to be a security threat; raiding private residences as a way of investigating crime are carried out jointly (Kraska, 2001, p.7). Militarisation involves collaboration at the highest level of the governmental and corporate worlds, between the defence and the crime control industries, where technology, information, and weaponry is shared, military hardware is acquired and military training undertaken by police forces (Dunlap, 2001; Kraska, 2001).

Enemy penology relies on society's consent to expand the state's use of violence as a response to social conflict. One result of this is the growth of cultural acceptance of solving problems with the use of violence (Kraska, 2001). Militarism refers to a set of beliefs and values shared by society that supports and emphasises the use of force through technology, armaments, intelligence gathering, aggressive suppression efforts and domination to solve problems and gain political power (Kraska, 2001, p.15-17).

Militarism converges with the enemy penology paradigm where language is used as a vehicle to spread social problems in war-like concepts such as risk or enemy against whom war will be waged (Alvarado & Zaverucha, 2010, p.231; Kraska 2001). Where violence and the use of force is generally accepted as a way of dealing with social conflict, it is unquestioned that the military is needed to fight crime, eliminate the enemy and protect those seen as law abiding. This acceptance extends to agreeing with curtailing or diminishing civil rights of the enemy.

## **All lost? Judicial response in emergency cases**

An important component of the rule of law, linked to equal treatment under the law, is an independent judiciary (Shirk & Ríos Cázares, 2007; Uildriks, 2010; Weingast, 2010). An independent, well-functioning judiciary is essential to constrain the state from violating fundamental civil liberties, including those related to access to justice and due process (Staton, 2007, p.273). Rutherford maintains that the role of the courts is crucial in restricting or approving of the reduction of due process guarantees in criminal proceedings and availing or limiting penal sanctions (1997). Judicial independence, according to interna-

tional consensus, is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial.<sup>39</sup> A judge must be independent as he decides a case on the basis of his assessment of the facts and in accordance with his understanding of the law, free of any external influences exerted by other branches of power, as well as by other colleagues. At the same time, a judge must remain independent from society in general and from parties involved in the case the judge has to adjudicate. In similar vein a judge must decide a case impartially, in other words, without favour, bias or prejudice.<sup>40</sup>

In emergency conditions where enemy penology features come into play, both judges and lawyers are required to operate under rules which have been deliberately designed to maximise the chances of a conviction and minimise the opportunities for organised groups to hinder and discredit the system (Hadden, 2000, p.205). The judiciary is required on the one hand to protect liberties and safeguard the integrity of a fair trial in the face of increasing security powers to investigate crime, while on the other hand it must foster national security in times of emergency.

### *Judicial deference to security concerns*

In describing limits to adjudication during emergency circumstances such as the Troubles in Northern Ireland, Walker noted a general tendency in the judiciary “towards terse assertive judgments which are deferential to security concerns” (2000, p.225). Deference appeared in many guises, such as through permissive interpretations of police powers, conducting superficial inquiries of possible illegally obtained confessions, or refusing to allow judicial officers to review detentions (Walker, 2000).

Scholars such as Issacharoff & Pildes, and Zedner, found a tendency of American and English high courts to show deference to Congress or Parliament in security issues. The justification was that courts were not democratically elected hence they lacked the authority to decide on matters of security, by comparison to elected officials’ democratic legitimacy and authorisation (Issacharoff & Pildes, 2004; Zedner, 2005). Similarly, Neuborne found throughout American history a general tendency of the courts to endorse security programmes such

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<sup>39</sup> The Bangalore Principles of Judicial Conduct were adopted in 2002 by a large number of countries, represented by members of national high courts. The right to be tried by an independent and impartial judiciary is contained in many international conventions including the Universal Declaration of Human Rights (article 10), the International Covenant on Civil and Political Rights (article 14), and the American Convention of Human Rights article 8).

<sup>40</sup> Values 1 and 2. The following values concern principles of: integrity, propriety, equality, competence and diligence.

as censorship laws during World War I or Japanese concentration camps in the U.S.A. in World War II (2005). At the same time, he found systematic attempts by a minority of courts and judges to limit or reverse the effects of those programmes. He concluded that judicial overview of the executive branch during wartime was partial. Although courts endorsed security programmes, they still sought adherence to some basic constitutional protections (Neuborne, 2005).

### *Indifference towards cases related to war*

According to Epstein, Ho, King, & Segal (2005), two main positions can be traced in the U.S. Supreme Court's responses to rights and liberties during wartime. One position shared by many commentators and scholars suggests that the Court privileges security concerns and opts to limit rights and liberties during wartime or emergency crises. In fact, these scholars argue that justices adopt a jurisprudential position that mirrors the position taken by the public and elected officials of demanding emergency powers in time of war (Epstein, Ho, King, & Segal, 2005, p. 20). This group also maintains that the Court's endorsement is a strategic decision to avoid ineffective judgements that could be disregarded by other branches of government. Justices then endorse security policies and programmes as a means of safeguarding institutional legitimacy in wartime (Epstein, Ho, King, & Segal, 2005, pág. 32).

The other position suggests that the Court's oversight is even more rigorous during wartime or emergency crises. The Court builds and maintains its legitimacy by protecting those rights and liberties that the government attempts to constrain; doing the opposite would undermine the Court's legitimacy. When political leaders and the general public show widespread support for emergency powers and curtailing rights and civil liberties, the Court becomes the guardian of rights, educating the public on the relevance of preserving those rights (Epstein, Ho, King, & Segal, 2005, p. 28-30).

Epstein et al. tested these positions quantitatively in order to determine the breadth and depth of the effect of war on effective civil liberties and rights, as opposed to analysing landmark decisions (Epstein, Ho, King, & Segal, 2005).<sup>41</sup> They examined six decades (1941-2001) of dispute outcomes submitted to the Court in which parties claimed a deprivation of their rights or liberties. The Court decided on the merits, whether in times of international urgency or not,

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<sup>41</sup> The study carried out by Epstein et al. used a quantitative approach to test the positions described above. Wartime was understood as a state of urgency that included not only absence or presence of war but also presence or absence of major international conflict and presence or absence of increased public support linked to an international event such as the terrorist attack of September 11, 2001.

and whether directly related to a crisis or not had civil liberties and rights been restricted.<sup>42</sup> This last distinction is particularly relevant; the war-related label was used for cases that began during wartime and where the genesis of the case was the war itself, such as wartime draft cases, war protest cases, among others. They analysed a total of 134 cases (Epstein et al, 2005).<sup>43</sup>

After examining similar cases where the only variant was the presence or absence of war, Epstein et al. found that in cases unrelated to war the Court was much more inclined to decide against claimants in civil liberties and rights than in cases during wartime. At the same time, they found that in war-related cases, no effect of war could be traced in the Court's decisions. In other words, they found that in war-related cases, the Court was equally willing to uphold rights and liberties in both wartime and peace (Epstein, Ho, King, & Segal, 2005, p. 72).

In trying to make sense of this paradox, the authors examined a range of possible explanations. The most salient finding for the purpose of this project is that tracing the Court's inclination in the liberty vs. security dilemma is difficult and deserves much deeper digging. In addition, it is puzzling that the judiciary appeared to take no stand in regard to security matters in the light of the finding that in war-related cases no particular preference was traced.

The war on organised crime declared by President Calderón represents a *de facto* state of urgency or emergency lived currently in Mexico. And this thesis essentially attempts to examine where the Mexican judiciary falls, either into the first position where judges endorse security programmes, or into the second one where judges act as guardians of civil rights and liberties. The scope of this project is different, smaller, for it concerns only drug-related cases from two circuits or states. It supplements analyses of judgements with qualitative interviews with judges from different tiers who discussed due process, sentencing

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<sup>42</sup> The chief dependent variable where outcomes of claims focused on rights and liberties included the following matters: criminal procedure, civil rights, First Amendment, due process, privacy and attorney rights.

If the Court decided in favour of the party claiming a deprivation of his rights, the decision was classified as liberal. They focused on the explanatory variable of the relative state of urgency with regard to threats of national security. This state of urgency was defined by: an absence or presence of war, presence of a major international conflict, presence or absence of increased public support for leaders caused by an international event. The Court's decisions on civil liberties and rights were tracked in order to examine if these were decided in time of war or peace. The study registered the time of decision as being when oral arguments were heard as opposed to when the decision was handed down, because the decision is typically determined by an initial vote taken shortly after oral arguments were made.

<sup>43</sup> The list also included courts martial for activity occurring in a war zone, deportation, citizenship and relocation cases resulting from the war, and war-related suits under the Emergency Price Control Act of 1942 and the Alien Property Custodian Act.

and overall judicial experience during the so-called war on organised crime.

Enemy penology is used in this thesis as a set of analytical tools to examine judicial decisions and judicial accounts to find out whether and to what extent the Mexican judiciary has endorsed security policies, including seeing defendants as sources of risk who need to be tried with lessened procedural safeguards and eliminated when found guilty; or are judges preventing the reduction of due process rights in criminal proceedings and further civil liberties. On one hand, judgements were examined through the way in which defendants were seen, the effectiveness in presumption of innocence and the sentencing values and practices embedded. On the other, interviews are examined through those same themes, but also through the different theories on judicial behaviour and judicial roles that attempt to account for the different reasons that help explain judges' uniformity in their judgements and their insulation from the environment. Hence, views and comments concerning the discussion on enemy penology revealed different ways in which judges assume theirs or their colleagues' role as judges. The theoretical frameworks on judicial behaviour and judicial roles are explained in Chapter 5.

## Conclusion

Enemy penology originated as an analytical model to assess legislation. It examined three prominent elements which uphold the dangerousness of offenders as a main trigger to justify a tougher pre-emptive response from the state, including diminishing due process rights and disproportionate punishment.

A major issue with enemy penology is its conflict with the rule of law. This paradigm fosters unequal legal treatment and reduces due process standards directly related to presuming defendants as innocent until proved guilty and the right to a fair trial. It functions within an exception regime, in which the state uses the justification of 'emergency' to act outside the boundaries of the legal system. Other implications concern policy practices with a precautionary logic in which a tougher response to crime control is used, utilising securitisation and militarisation policies which could lead to limitless use of violence by the state. Overall, it is held throughout the chapter that enemy penology's traits can be found in legislation, policy making, judicial decisions and rhetorical discourses, all of which will be discussed in regard to the Mexican context in Chapter 3.



## Enemy penology in the Mexican legal and political context

### Introduction

The recent Mexican criminal justice landscape is analysed here based on the prior discussion of enemy penology.<sup>44</sup> The increasing involvement of the military in public safety and criminal justice affairs is examined as well as the enhanced use of pre-emptive mechanisms to pursue crime investigation. This chapter initially discusses the legal concept of national security and policy documents that show ways in which the notion of national security began including crime control matters. This discussion is followed by an analysis of the increasing militarisation of criminal justice, examined under Kraska's indicators. This includes a systematic analysis of public officials' statements that endorse an enemy penology ethos. The last part includes a discussion on changes in criminal justice with particular emphasis on pre-emptive measures used for the purpose of crime investigation. These measures mirror the enemy penology paradigm that lawfully permits intrusive investigation strategies and coercive tactics to prevent allegedly dangerous offenders from committing crime.

Attention is be paid to judicial decisions responding to policies, laws and decisions which reinforce the characteristics of enemy penology. However, judicial responses are somewhat limited.

An underlying assumption of the legal analysis that follows is that laws arise from a certain political context and set of experiences and are the result of the actions and interests of specific actors (Speckman Guerra, 2007, p.227). Hence, law is not considered neutral but rather advanced by particular actors with their own agendas. I argue that legal documents, criminal justice practices and political discourse contain enemy penology's traits and that these are advanced

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<sup>44</sup> Legal reforms between 1931—the year in which the Federal Criminal Code was enacted—and 1982 were relatively few. Changes to the legal framework and institutional settings, advancing adversarialism and also legislation aimed at prosecution and punishment of organised crime and other serious offences, can be traced since the end of the eighties onwards, however, the most relevant reforms can be traced in the nineties.

by different players through social constructions, namely laws, judicial interpretations, crime control policies and public officials' statements. These players conceptualise and advance a particular set of principles through their own constructions (del Olmo, 1996). Although the mass media is also a relevant player, it will not be dealt with here because it is an object of study that would deserve great attention and to this date there is insufficient systematised data that can provide with information to be analysed, hence an oversimplified and shallow account of the mass media during this period is rather avoided.

## The concept of public safety and national security

The legal and political notions of public safety and national security were challenged amidst crime rates peaked in the nineties and underwent several legal changes, together with the governmental entities, including the police and the military. Public safety was initially a matter dealt with exclusively by municipalities (or townships), but after 1994 the Constitution made it also a federal matter which could then be dealt with by federal forces, paving the way for the increased involvement of the military.<sup>45</sup>

The legal concept of public safety encompasses issues of crime control, including order maintenance, crime prevention and enforcement of penal sentences, with the aim of preserving freedom, order and peace.<sup>46</sup> In contrast, national security comprises, in broadest terms, the defence of territorial integrity, stability and maintenance of the state and its institutions.<sup>47</sup> However, its extended conceptualisation, as will be argued below, has come to include crime control policies.

After public safety became a federal responsibility via a constitutional reform, the Law of the National Public Safety System was enacted in 1995.<sup>48</sup> Members of the National Defence Secretariat and the Navy Secretariat which together

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<sup>45</sup> Parallel to the evolution of the notion of national security and its representation in policy documents, the role of the military in fighting the war against drugs has also changed. The first participation of the military in a drugs operation can be traced to beginning of the twenty century. However, until the late 1990s, most presidents remained reluctant to call on the military (Astorga, 2007; Bergman, 2007). Previously, military forces were relegated to providing assistance to police officials when specifically requested, and to help with destroying crops that would produce illicit drugs (Astorga 2007; Bergman 2007).

<sup>46</sup> Article 21 of the Constitution and Article 2 of the Law of the National Public Safety System.

<sup>47</sup> Article 2 of the Law of National Security.

<sup>48</sup> This law established the general frame of coordination of the public safety system for anti-crime and drug efforts.



conform the Mexican military were legally authorised to participate in matters related to public safety, in addition to national security.<sup>49</sup> Hence, both civil and military authorities dealt with security issues as members of the National Council for Public Safety. In 2004, reforms to the Constitution allowed Congress to legislate in national security issues and also entrusted the president to “preserve national security”.<sup>50</sup> As the formal head of the military, the president was indirectly authorised to deploy the army to guarantee national security. A year later, the Law of National Security was enacted, which defined certain threats to national security, including the fight against organised crime.<sup>51</sup> In 2009, President Calderón promoted the enactment of several reforms designed to increase the participation of military officials in public safety issues. These reforms have still not been passed by Congress.<sup>52</sup> The extent to which the military may participate in public safety issues was initially discussed in the *scjn*.

*The judiciary’s response: approving of militarisation of public safety*

The authorisation of the involvement of military personnel in public safety matters was brought to the *scjn* by several members of the opposition in Congress because considered it to be against the Constitution. The *scjn* ruled unanimously in 1996 that military personnel could indeed assist civil officials in public safety issues when required or asked to do so. The main argument was that all authorities with powers directly or indirectly related to public safety must collaborate in order to preserve peace, freedom and order (Sánchez Cordero, 2001).<sup>53</sup> After this decision, the *scjn* issued three more binding rulings in a private session in 2000 which validated the intervention of the military in public safety affairs only where civil authorities requested their aid. And, the military’s intervention did not require the President’s formal declaration of the temporary suspension of liberties, that is, to declare a state of exception, to participate in public safety affairs.<sup>54</sup> This last binding raises interesting questions concerning the non-official

<sup>49</sup> Article 12 of the Law of National Security.

<sup>50</sup> Article 89 of the Constitution.

<sup>51</sup> Article 5 of the Law of National Security.

<sup>52</sup> By 2011, members of different parties within both Congress and Senate had agreed that organised crime, drug-trafficking and money laundering were matters which should be considered within the scope of national security.

<sup>53</sup> Binding ruling titled: “Army, navy and air force. Their participation to help civilian authorities is constitutional. (Interpretation of article 129 of the Constitution).”

<sup>54</sup> These binding rulings are titled: “Army. They can participate in civil actions in favour of public safety, in cases where suspension of liberties is not required, this must obey to the express petition of civilian authorities, under their command and bound to the Constitu-

or rather informal state of exception or state of emergency. According to the Constitution, a state of emergency or suspension of liberties petitioned by the President only proceeds if sanctioned by Congress and the Senate, and with the scjn reviewing the petition's abidance to constitutional standards. The scjn, through the above mentioned binding ruling, essentially authorised the President's determination to draw on the military to address any circumstances seen as posing danger, bypassing the constitutional safeguards to prevent the President from acting unilaterally.

The military's involvement in public safety appears difficult to reverse. Judicial oversight over military improper actions was addressed by the scjn in 2012. In that year, the scjn determined that civil courts could hear cases where soldiers were charged with offences against civilians.<sup>55</sup>

### *The executive's response: paving the way for militarisation*

As discussed above, the focus of national security began to shift from the defence of sovereignty to internal affairs including crime control. Since then, the military began to rethink its national security functions (Camp, 1992). This change is reflected in national policy documents which describe guiding principles and are issued by the president to set out the aims of his administration. All federal agencies must adhere to these principles.

### *Policy documents*

In the 1980s, according to the National Development Programmes (NDP) issued by the president, national security was mainly focused on sovereignty, integrity and independence (Lima Malvido 2011, p.13). National security was mostly seen as a tool to safeguard freedom, social justice and peace within the nation but appeared to shift when the NDP of 1983-1988 established: "In view of the fact that circumstances have changed, the armed forces have been transformed so that their strictly military original role has been recast to include growing activities related to the wellbeing of the community" (quoted in Herrera Lasso & González, 1993, p.349).

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tion and law." "Army. Can intervene under strict orders of the President and bound to civil liberties when, not in circumstances that require to declare a state of suspension of civil liberties, there is credible fear that if the army does not intervene immediately it would imminently lead to serious circumstances that would force to declare a state of exception." "Army. Its intervention in public safety affairs is constitutional".

<sup>55</sup> Amparo indirecto claim alleging that the Military Criminal Code stood against the Constitution in regard to the extent of its jurisdiction, resolved by the scjn in August 2012. Case registered under AIR 133/2012. <http://www2.scjn.gob.mx/AsuntosRelevantes/pagina/SeguimientoAsuntosRelevantesPub.aspx?ID=136182&SeguimientoID=478>

By the late 1990s and early 2000s, national security encompassed issues related to the enforcement of the rule of law, human rights and social justice. A main goal of national security became the need to preserve the collective interest by minimising any risk to the physical integrity of the population and to Mexican institutions (Lima Malvido, 2011). The latest NDP (2007-2012) specifically established a series of goals aimed at combating organised crime, and justified the necessary use of the military:

The resources that result from drug trafficking give criminal organisations great power to acquire different forms of transport, high-power weaponry and advanced communication systems, as well as equipment which frequently supersedes that of the police force in charge of combating and preventing offences associated with drug trafficking. For that reason the collaboration of the armed forces is necessary in this fight. (Presidencia de la República, 2007, p.58).

This evolution is mirrored in policy documents issued by the National Defence Secretariat. By the end of the 1990s, the army included anti-drug operations as one of its four general sets of missions (Camp, 2005).<sup>56</sup> The 2001 Yearly Development Programme established that the Mexican army played an active role in domestic issues ranging from civil duties (i.e. reforestation) and aiding the population in the event of public need to guaranteeing domestic safety, including fighting drug trafficking, ensuring and maintaining order (Moloeznik, 2009). Further, the Sectorial Development Programme Concerning National Security 2007-2012 explicitly mentioned, as one of the goals entrusted to the National Defence Secretariat, the need to “regain the state’s strength and security by a frontal assault on drug trafficking and other manifestations of organised crime” (SEDENA, 2007, p.12). Hence, “their actions, in collaboration with other institutions, are aimed at regaining spaces hijacked by drug traffickers and other criminal organisations, in order to provide society a safe and peaceful environment” (SEDENA, 2007, p.13).

In addition to the National Defence Secretariat, the Navy Secretariat also integrated the goal of fighting drug trafficking in its policy documents. The Navy Secretariat explicitly mentioned the aim of responding to increased criminal activity led by organised crime gang members and ordinary offenders. Moreover, amongst its objectives, the naval forces aimed to “foster a safe environment

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<sup>56</sup> The sets of missions are labelled DN-I, DN-II, DN-III, and DN-IV. The first includes plans aimed at external defence against a foreign enemy (DN-I), the second deals with internal security threats and with maintaining social peace (DN-II), the third is focused on providing disaster relief (DN-III) and the fourth organises and legitimises the military’s anti-drug missions (DN-IV).

and contribute to the wellbeing of society through participating in operations of high impact in several coastal states of the country to fight organised crime” (SEMAR, 2007, p.31).

In parallel to changes in legal concepts and policy initiatives, the participation and influence of the military in public safety and criminal justice took place. The expansion of the scope of national security as to include public safety and crime control issues overlap with the shift towards militarisation within criminal justice institutions, tactics and equipment used for crime control and the embrace of military values.

## Increased military participation

From President Ernesto Zedillo’s (1994-2000) administration onwards, institutional and policy arrangements laid the foundation for increasing the military’s role in fighting crime. The military’s participation in responding to organised crime and drug trafficking was reinforced when the military’s involvement was described as a national security matter (Alvarado & Zaverucha, 2010, p.235-7). According to authors such as Astorga (2007), Benítez Manaut (2010) and Bergman (2007), the involvement of the military seems almost impossible to reverse.

Kraska’s indicators are relevant when assessing the degree of militarisation of the police and other criminal justice agencies. These indicators include: organisational arrangements, including special squads focused on high-crime areas; military operatives; type of equipment used; and discourses and values highlighting martial terms and the effectiveness of using the military to wage war on social problems.

### *Organisational arrangements*

Changes in organisational arrangements may be observed in the background or profile of high-ranking officers in the government and in martial units. Military officials have increased their involvement in crime control agencies (Alvarado & Zaverucha, 2010; Artz, 2003; Astorga, 2007). Their participation has been mainly focused on drug trafficking, but may expand to other types of offences in future.<sup>57</sup> In 1995, the National Public Safety System was established and included high-profile civil and military authorities (Camp,

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<sup>57</sup> This was confirmed by a former prosecutor during an informal conversation in January 2012.

2005). As a result, the attorney general and the head of the National Defence Secretariat, together with other officials, dealt with issues of public safety and national security. By the mid-1990s, more than half of Mexico's 32 states had military officers assigned to police command positions (Alvarado & Zaverucha, 2010; Schulz, 1997, quoted by Astorga & Shirk, p.28) and state attorney general offices (Alvarado, 2010, p.228, 246-259). The presidents who followed after 2000 significantly deepened military participation in domestic public safety initiatives (Astorga & Shirk, p.28). Notably, in President Fox's administration (2000-2006), the attorney general had a military background, as did those who held principal positions of intelligence and operations within the Public Safety Secretariat (Alvarado & Zaverucha, 2010, p.228, 246-259; Camp, 2005, p.118).

During President Fox's administration, special units, named Gafes (Groups of Aereo-mobile Special Forces) implemented the most important anti-drug operations (Astorga, 2007, p.89). Gafes consisted of military forces with American training in terrorism, hostage rescue and anti-drug initiatives (Astorga, 2007, p.89; Camp, 2005, p.116). Gafes were responsible for capturing major drug cartel leaders but soon evolved to becoming the coercive arm of the Gulf drug trafficking organisation and afterwards became an independent drug trafficking organisation particularly violent called the Zetas. According to the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Zetas from the end of 2009 onwards began using high calibre weaponry such as military explosives, Claymore mines C-4 and grenades (Reuters, 2011). This criminal organisation represents a landmark for being highly equipped and trained which forced private armies of other criminal groups to improve their military training and acquire higher calibre weaponry (Trejo, 2015). Drug trafficking organisations began to systematically recruit former state agents, such as police officers, to form private armies and use these agents to train new generations of gunmen to safeguard territory destined for producing or distributing drugs, paying off and enforcing informal networks of protection or other activities.

The creation of Gafes has become very controversial as the existence of the Zetas is directly linked to it. The formation of the Zetas may be seen as an explicit and crude illustration of the harms produced by a criminal justice initiative where new forms of unsafety and violence were caused after the state's measures, a key example of criminal iatrogenesis discussed in the first chapter (Bowling, 2011).

### *Operational arrangements*

Intelligence collaboration has led to the investigation and detention of several heads of municipalities or *Presidentes Municipales* (Alvarado, 2010, p.228, 258). In addition, members of the Navy Secretariat have repeatedly detained alleged members of organised crime groups (Alvarado, 2010, p.251). It is unclear to what extent police forces rely on military tactics to investigate crime. Nevertheless, from the National Commission of Human Rights report mentioned above, it is suggested that federal police in tandem with armed forces carry out property searches and detentions, frequently violating civil rights.

### *Material arrangements*

Intelligence training and military equipment have been distributed to all criminal justice agencies. Police forces are currently trained by members of the army (Alvarado & Zaverucha, 2010, p.249). As a result, the presence of the military has increased within branches of the police investigating federal offences. Approximately 35,000 to 45,000 soldiers (1/5 of the army) have joined police activities, in a context where the police force numbers 35,000 nationally. Since 1995, the National Defence Secretariat has devoted 25 percent of its budget to the fight against drug trafficking, and by 1999 the air force had restructured its units into three broad regions (Camp, 2005, p.115). Similarly, from 2000 to 2009 the National Defence Secretariat's budget increased from 20,000 million to 43,000 million pesos (Alvarado & Zaverucha, 2010, p. 249). Under the Mérida Initiative, approved in June 2008, the U.S. agreed to send Mexico weaponry, training and other assistance worth \$1.6 billion pesos from 2008 to 2012 (Astorga & Shirk, 2010, p.3; INH, 2010).

### *Official statements: promoting militarism*

The statements analysed here were gathered mainly from executive government officials during President Calderón's administration (2006-2012), including the president himself. Militarism is embedded in their tone and content. The statements are framed in distinctly punitive terms, revealing ambiguity between crime control and warfare. Objectives range from incapacitating organised crime group members and ensuring public safety to destroying enemies of the state. Such discourse promotes the impression of a permanent state of insecurity and the urgent need to use the military to protect society from danger imposed by enemies, as the only instrument. Thus, the state's criminal policies and strategies are carried out by both the police and the military (Alvarado & Zaverucha, 2010). However, the president has not legally declared a state of emergency, limiting civil rights and liberties (which in any case would require both Congress

and the SCJN's sanction). Such ambivalence paves the way for blurred, unaccountable actions, where enemies and emergencies are determined arbitrarily.

Ordinary offenders and drug traffickers are consistently cast as enemies of society. According to government officials, organised crime, particularly crime related to drug trafficking and related offences, represents a serious problem which not only affects individual and collective interests but also endangers national security and the state itself. Such threats are largely due to that drug trafficking organisations and other criminal groups are violent and highly skilled, appearing to be out of reach from the scope of traditional criminal justice. Such discourse and tone may be traced in the eighties and nineties statements (Moreno Hernández, 2001, p.151).

### *Warfare and enemies*

In his first speech to the nation, former President Zedillo claimed in 1994 that “Giving drug-traffickers immunity is intolerable, for this is the greatest threat to national security, the gravest risk to public health and the bloodiest source of violence.”(1994). In 1998, President Zedillo announced a set of strategies under the National Crusade against Crime and Delinquency (1998). This programme included using the military forces to combat drug trafficking. More than a decade later, President Calderón established a similar policy, the National Security Strategy, in which both police and military forces focused on weakening and incapacitating members of organised crime groups (Periodistas de México, 2011). In August 2008, President Calderón, together with senior state and municipal officials, and with members of the executive, Legislative and the Judicial<sup>58</sup> branches of government signed the National Agreement for Security, Justice and Legality in which persistent offenders and organised criminals were referred to posing the gravest threat to society.<sup>59</sup> The boundaries and differences between the military and the police are difficult to pinpoint. At the same time, criminal problems are equated to military missions. Policy discourse reflects such ambiguity. As the former Attorney General Eduardo Medina Mora clarified: “It is not a war on drugs but a war on crime,” and “government has a duty to provide cities the right to be in peace” (2011).

The head of the Public Safety Secretariat stated:

Since the first day of this government, the Public Safety Secretariat has carried out a direct and systematic battle against organised crime, with the purpose of re-establishing the security and public order that society

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<sup>58</sup> The contents that concern the Judiciary are discussed below.

<sup>59</sup> Published in the Federal Official Diary on 21 August 2008.



demands. Through the Mexican Republic, we are in an offensive [strategy] against delinquency and organised crime. [...] . We are convinced that we will win the battle against crime, we have everything necessary to dismantle the criminal structures that seek to become entrenched in our country. (García Luna, 2008).

The head of the National Defence Secretariat said:

We live in a globalised world, in which antagonisms use instability as an emblematic currency in many regions. Drug trafficking and organised crime represent a real danger to everyone's health and security, as well as to the stability of national institutions. This scenario has made it imperative that armed forces, within the legal framework, carry out a decisive battle against the criminal organisations that threaten society and put national security at risk by pretending to build empires of crime. We will not take a step back. We will continue without rest until we have forced them to submit. Their interests are not greater than those of Mexico. (Galván Galván, 2008).

The head of the Navy Secretariat stated:

The Mexican navy, within its legal powers, is determined to confront the calamity of delinquency with all the national naval power, these pursued actions are coordinated with other involved state institutions. Only with the shared goal, we have weakened the structures of delinquency. (Saynez Mendoza, 2010).

The quotations transcribed above were made by high profile officials, a non-military and two military ones. The three of them used terms and ideas that equally draw on both a context of warfare and crime control. Health and safety issues are mentioned in parallel to national security and the country's stability portraying them as entangled. Battles against organised crime, offensive strategies and the decisive involvement of armed forces in these battles convey the message that only a military response could be used to respond to the 'emperors of crime' and the 'calamity of delinquency'. The involvement of the military in public safety, as a joint action with civilian institutions, is continuously justified. It appears that military and non-military officials who wage a war against those that threaten society and the country as a whole, merit unquestionable loyalty and support from the nation.

In other statements, the harms caused by drug trafficking and organised crime defined as enemies, are described. When addressing military forces, the President stated:

You have accompanied society in the war against the new enemies of the country: the criminal organisations that threaten the integrity and security of the families, the freedom of people and those who pretend to

kidnap our public spaces and communicate through violence. (Calderón Hinojosa, 2008).

The head of the National Defence Secretariat stated:

Let us be aware that some places in the present are serious in which violations to public safety result in threats against interior security. Do not forget that delinquency is an enemy that mimics, moves and hides from within society. It is an adversary that respects no law and only responds to a double code: profit and death. (Galván Galván, 2010).

Similarly, the head of the Navy Secretariat claimed:

The Mexican naval soldier is alert to anything that threatens its security. Through joint efforts with other police and military institutions, we confront organised crime with every resource in our reach, organised crime which erodes our institutions, puts our democracy at risk, degrades societies and threatens the most fundamental of rights: the right to life. (Saynez Mendoza, 2011).

From the quotations above, drug trafficking and organised crime offenders are described as powerful to the extent of jeopardising national security and democracy, and causing public institutions to crumble or ‘erode’ as represent a real danger to everyone. According to President Calderon there is an overriding need to eradicate criminals and defeat them, as the rise of violent crime is due to the expansion of criminals (Calderón Hinojosa, 2011). As Ferrajoli argues, enhancing an image of dominant and forceful rivals helps justifying the use of a more coercive and aggressive state response (2007). At the same time, it is unclear whether these ‘enemies’ amount to be treated as any foreign military force or as offenders within the scope of criminal justice. Overall, these statements reveal undertones of warfare and the assumption that there is an urgent need for the use of military force. Also, the moral tones of these statements emphasise a divide between the good and the bad, the reasonable and law-abiding on one side, and the degraders of society on the other. As Birkbeck argues too much description of these enemies would render humane attributes and make the boundary between the good and the bad much more complex and even blurry (2013).

### *Casualties*

President Calderón was questioned about the lack of investigation and prosecution of those responsible for the people killed, which by the end of his administration (2012) numbered 105,682 (Amnesty International, 2015). The official response claimed that 90 percent of those killed were involved with drug trafficking, so it was not a priority to determine responsibility (Calderón Hinojosa,

2009). Nonetheless, this lacks any evidence or criminal investigation. Public messages from high-profile officials helped legitimising the removal of human rights of those suspected of involvement with drug-related violence (HRW 2011, p.15). Furthermore, this tone has permeated other official statements, such as those made by cabinet members or criminal justice practitioners. For instance, the head of the Navy Secretariat has maintained that human rights violations are put forward by human rights organisations and activists to undermine public institutions (Muñoz, 2011). According to a federal prosecutor, allegations of torture are false because “the only one who lies is the accused criminal” (HRW, 2011, p.15). Whether this discourse influenced the way the federal judiciary tried ordinary defendants—as opposed to those charged for organised crime-related offences—was a key topic discussed with judges during the interviews and is a question that lies at the heart of this thesis.

### *Society’s openness to military involvement*

In a parallel to public discourses, the general public appeared to be receptive to militarism. The authoritarian legacy in Latin American countries persists; according to Uildrinks, prior to the 1990s, law enforcement agencies solved conflicts by force, making arbitrary decisions (2010). It is no surprise that in 2011, 58 percent of the population thought it was more important for the government to maintain law and order than to protect personal freedoms (Pew Research Center, 2012). Social approval of and consent to the use of military or police violence to settle conflicts remains evident in more recent surveys.

In 2008, 45 percent of Mexicans agreed with the military’s involvement in fighting drug trafficking, (Moloeznik, 2009), while in 2011, 83 percent of Mexicans agreed with the involvement of the military in the “war on organised crime” (Pew Research Center, 2012). It appears that in the eyes of most members of society, the military forces have been more effective in fighting drug trafficking, both in capturing drug leaders and seizing assets related to the production and manufacturing of drugs, than civil authorities including the police (Beltrán & Cruz, 2011). Mexican society exhibits high levels of trust in the army, which ranks just below the church and the universities.<sup>60</sup> This confidence is reinforced by the hybrid nature of the Mexican army, which not only is in charge of national security but also of providing aid such as disaster relief (Camp, 2005). Moreover, 70 percent of the population questioned in 2011 said to have an excellent or very good impression of the army. In contrast, criminal justice officials suffer from severe lack of trust. From official statistics, sensa-

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60 Survey Mitofsky 2008, 2010 and 2011 consulted in <http://consulta.mx/>

tionalist press and personal testimonies, Piccato concludes that the police and the judiciary are seen by the general population as sources of insecurity and unmerited harassment rather than protection (2007, p.83). In the face of ineffectiveness, corruption and even criminal activity by law enforcement agencies, the public demanded a tougher response to criminals even if that involved greater reliance on the military (Donnelly & Shirk, 2009, p.1).

## Criminal justice and pre-emptive measures

In 1998, drug-trafficking was declared to be a crime against humanity by chief justices from more than twenty countries across Latin America, Spain and Portugal including Mexico.<sup>61</sup> They stated the need to coordinate international efforts to fight drug-trafficking. Also, they noted the need for judicial specialisation on trying drugs offences and the need to provide protection mechanisms for judges in charge of trying drug-trafficking cases.

Ten years later, the Mexican President, the Congress and Senate, state governors and the Federal judiciary, published a number of institutional commitments aiming to contribute in addressing the safety crisis. These commitments ranged from restructuring the police across the country, to pursuing crime prevention programmes, and included several actions related to judicial proceedings.

For instance, courts designated in maximum security prisons would become authorised to hear cases of organised crime and drug-trafficking. Defendants charged for those type of offences would be concentrated in maximum security prisons. Also, new mechanisms were to be created to protect judges, particularly those in charge of trying cases related to organised crime offences. These mechanisms aimed at avoiding delinquency's power, including threats and violence, to affect judicial decision. In addition, specialised courts were created with the sole purpose of granting or denying pre-emptive measures including *arraigos* and property searches, discussed below.

In sum, several administrative measures were taken within the Federal judiciary to decide organised crime cases which resemble to enemy penology. Being sent to a maximum security prison signified to distance or even root out the defendant from any sort of connection with potential offenders but also from family and other social networks. The creation of specialised courts to examine and issue pre-emptive measures revealed that these were hardly exceptional but also that had become part of the institutional structure.

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<sup>61</sup> Caracas Declaration was signed in 1998 in the Ibero-American Summit of Chief Justices of Supreme Courts and Tribunals in Caracas, Venezuela.

Some of these measures, particularly the enactment of special rules that govern criminal proceedings to investigate and prosecute organised crime related offences are, according to Hadden, common practices in states of emergency (2000). Mexico has not officially declared a state of emergency, nonetheless it is worth to point out the overlaps between measures taken by the Mexican judiciary and those found in other jurisdictions. Hadden argues that in states of emergency such as experienced in Northern Ireland and Turkey, the legal framework of the criminal procedure tends to be modified in order to secure convictions of particular type of offences (2000). These legal changes include from relying on vaguely defined criminal offences,<sup>62</sup> using pre-trial procedures for crime investigation, special evidence rules and the creation of special courts (Hadden, 2000, p.211-213). Pretrial procedures typically aim at extending grounds for arrest and periods allowed for detaining suspects. These measures are generally associated with improper practices, including ill-treatment and torture, particularly in cases where the period of detention is long (Hadden, 2000, p. 213).

Hadden argues that judges' role and decisions must be assessed bearing in mind the emergency settings and the subsequent modifications on the legal framework of criminal proceedings (2000). The way in which Mexican specialised courts try organised crime suspects is not addressed here, but the main focus lies on pre-emptive measures which to this day are applicable to both ordinary and organised crime offences.<sup>63</sup> Whether Mexican judges endorse these changes is the main concern of this section, in particular, whether judges validated the use of two pre-trial procedures or pre-emptive measures deemed as highly intrusive and contrary to civil liberties: the detention for investigation order, called *arraigo*, and the property search warrant, called *cateo*. To grant these orders, courts need only mere indications, as opposed to solid evidence despite their invasiveness. These investigation mechanisms evoke Jakob's paradigm of pre-emptiveness for the sake of incapacitating criminals.

### *Arraigo*

*Arraigo* is a measure to facilitate the investigation of any offence by detaining a suspect, issued considering both the nature of the offence and the particular characteristics of the suspect. It was first added to the Federal Criminal Proce-

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<sup>62</sup> Courts tend to reach verdicts, either convictions or acquittals, largely based on the discretion due to imprecise legal elements of the offence (Hadden 2000, p. 211).

<sup>63</sup> For an overview of criminal proceedings under the Federal Legislation on Organised Crime, see Brucet Anaya, 2007.

dural Code of in 1983, and at first it could be requested and authorised by any prosecutor. Currently an *arraigo* order must be issued by a judge after being requested by a prosecutor.<sup>64</sup>

Previously, detention for the purpose of investigation could be for 30 days and extended to a total of 60 days. After the constitutional reform in 2008, *arraigo* became available for a period of 40 days and could be extended to 80 days in total.<sup>65</sup> This measure is enforced by prosecution personnel, accompanied by members of the police or army, and suspects may be kept in any premises as long as they are kept under surveillance. Although *arraigo* may be authorised for the purpose of investigating offences related to organised crime, according to the 11<sup>th</sup> Temporary Provision it may be used until 2016 by both federal and local prosecution agencies to investigate all serious offences.<sup>66</sup>

Enabling *arraigo* orders for all serious offences means widening its application, which increases the possibility of detention merely for investigation. *arraigo* leads to a lack of recognition of any of due process rights concerning a fair trial, the right to legal defence and presumption of innocence. Because a person held under an *arraigo* order is detained only for investigation, in other words, no solid incriminatory evidence has been produced and the suspect has not yet been charged (CMDPDH *et al.*, 2011).<sup>67</sup>

### *The judiciary's response: attempting to contain pre-emptive detentions*

In 1999 the scjn declared that *arraigo* violated the rights of personal freedom and free transit established in the Constitution. In 2006 the scjn restated that view, arguing that *arraigo* was inadequate as it breached various constitutional provisions encompassing the right to a fair trial. Interestingly, this last decision was divided; five justices voted in favour, four voted against. The lack of consensus on such an essential matter underlines the importance of investigating judges' stance on measures that curtail due process principles to facilitate the investigation and conviction of offences.

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<sup>64</sup> The term 'facilitate' was used by the courts when analysing the use of *arraigo*. See the non binding ruling titled: "Criminal *arraigo*. Article 122 bis of the Criminal Procedure Code from Chihuahua established the *arraigo*, does not contravene the constitutional right of personal freedom contained in articles 16, 18, 19, 20 and 21 of the Federal Constitution.". In that ruling, the Supreme Court declared that *arraigo* has two aims: facilitate the investigation and avoid a suspect fleeing and making a detention order void.

<sup>65</sup> Article 16 of the Mexican Constitution.

<sup>66</sup> Temporary provision refers to those articles which do not form part of the Constitution but inform the implementation of changes made.

<sup>67</sup> A group of national and international ngos filed a report with the Interamerican Commission of Human Rights to discuss the negative effects of *arraigo* orders on due process and freedom rights.

In June 2008, despite the scjn's ruling, several reforms were passed and the Constitution was modified to include the possibility of ordering the *arraigo* of persons suspected of organised crime offences. As a result, the scjn could no longer argue that *arraigo* stood against the Constitution as it became expressly permitted by the Constitution. By the end of 2008, the federal judiciary, acting in accordance with the reforms, created special courts with the specific purpose of deciding pre-emptive measures cases concerning *arraigo*, cateo and phone-tapping. Some courts modified their legal reasoning to issue *arraigo* orders, arguing that such detention amounted only to an act of discomfort or nuisance (*acto de molestia*) which is considered less intrusive and serious than, a restriction of freedom, on the basis that the aim of *arraigo* is not to restrict the suspect's freedom but to keep him from avoiding being tried (CMDPDH *et al.* 2011, p.23). It is unclear whether all courts are following the same reasoning, but this illustrates the type of argument advanced by judges who favour a pre-emptive approach.

Arguments about the lawfulness of *arraigo* orders remain inconclusive. In April 2015, the scjn determined that these orders were lawful and conformed with constitutional standards concerning serious offence charges. It was also held that the *arraigo* was not consistent with the new criminal justice system that will come into full operation by 2016. A preliminary result of the constitutional reform concerning *arraigo* seems to be that the judiciary shifted its criteria away from protecting the right to fair trial and principles of personal freedom towards crime control. Whether that shift was forced upon the judiciary or embraced freely is difficult to determine, particularly given the lack of consensus within the scjn. However, judicial decisions reached elsewhere indicates that judges may prefer to endorse security policies to avoid other branches of government to disregard the court's decisions (Epstein, Ho, King et Segal, 2005).

### *Arraigo practices*

In 2010, the Federal Attorney General (head of Federal Prosecution Services) maintained before the Senate that the use of *arraigo* orders were of great value to the process of justice and essential to the collection of evidence.<sup>68</sup> Further, the Mexican government argued before the Interamerican Commission's hearing in 2011 that *arraigo* was of paramount importance in the fight against organised crime.<sup>69</sup> Whether *arraigo* orders have meant an increase in convictions, heightening the efficiency of crime control is difficult to ascertain because cases that begin with an *arraigo* order do not necessarily end in a convic-

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<sup>68</sup> Hearing related to the 2010 Year Report. Quoted by CMDPDH *et al.* 2011.

<sup>69</sup> Press release on the hearing held, consulted in CMDPDH *et al.*, 2011.



tion. Based on news reports, the *CMPDPDH et al.*, held that between June 2008 and May 2010, 1,051 *arraigo* orders had been issued, but only in 20 percent of cases was the offender convicted (2011, p.26). Although official documents, as opposed to news reports, would deliver more precise and reliable information, these levels of inefficiency raise serious questions about the reasonableness of restraining personal freedom under *arraigo* if it seems to be of such little help in increasing the conviction rate.

In practice, suspects under *arraigo* orders are mainly detained on the premises of the prosecution services.<sup>70</sup> Several suspects, such as local police officers who allegedly had links with criminal organisations, have been kept in military premises, based on a collaboration agreement between the National Defence Secretariat and the Attorney General's office (*CMPDPDH et al.*, 2011, p. 11). In practice, being held under an *arraigo* order seems equivalent to being held incommunicado by state forces. Furthermore, the number of *arraigo* orders issued in 2010 seems to be higher in states where army forces are actively involved in fighting organised crime than in states where army forces are not actively participating (*CMPDPDH et al.*, 2011, p.14).

According to *CMPDPDH et al.*, 94 percent (123 in total) of all *arraigo* orders issued in 2010 by federal judges authorised the maximum period of detention consisting of 40 days (2011, p. 15).<sup>71</sup> They found a similar trend in local courts where 92 percent of all *arraigo* orders granted by Mexico City courts authorised the suspects' detention for the maximum period (*CMPDPDH et al.*, 2011, p.28). This suggests that federal and local judges grant the great majority of detention orders for the maximum allowable period. Also, the use of the maximum detention period in the great majority of *arraigo* orders may indicate support for demands for stronger security measures advocated by the executive branch of government.

Nevertheless, a judge specialising in issuing *arraigo* and cateo orders described different techniques used by prosecutors to pressure judges to issue *arraigo* orders.<sup>72</sup> For example, prosecutors tended to overburden courts which did not find in favour of the prosecution submitting lengthy files. This meant that

<sup>70</sup> Such practice was approved of by the courts in the binding ruling which stated that the detention of the suspect could also be carried out in premises other than his home. Amparo en revisión 81/2009, juicio de amparo indirecto: 326/2009-1 Fourth Constitutional Tribunal in Criminal Matters of the First Circuit. Quoted by *CMPDPDH et al.*, 2011.

<sup>71</sup> *CMPDPDH et al.* used mass media records as a source of information, which is useful only for giving an approximate idea of the most common periods of detention rather than a solid notion of these.

<sup>72</sup> Mexico City first instance judge 1.

judges were forced to decide whether to issue the *arraigo* order or not within the regular time frame (24 hours) while studying complex and tedious files. This resulted in judges issuing *arraigo* orders almost by default because it seemed easier to rule in favour of the prosecution and consequently issue the *arraigo* order than arguing that, after having studied carefully all the documents contained in the file, there was insufficient evidence to grant the *arraigo* order petitioned by the prosecution. Another technique described by this judge involved that prosecutors held suspects detained because once an *arraigo* order was lifted, they petitioned for another to a different court. In consequence, suspects were detained for indefinite periods of time under subsequent *arraigo* orders.

### *Cateo*

Property searches are a means of investigation in which officers enter private premises in search of evidence relating to or resulting from an offence. Entry must be authorised by a judge and may be granted when there is sufficient evidence pointing towards the existence of objects or people related to an offence. The property search must comply with a series of requirements designed to prevent arbitrary and illegal searches (CNDH, 2011).<sup>73</sup> For example, the officials conducting the property search have to appoint independent witnesses to ensure that any actions considered illegal would be reported (CNDH, 2011).

Despite the requirements established in the Constitution, several state laws and the Military Code of Justice applicable to armed forces enables law-enforcement agents to conduct a property search without the authorisation of a judge under exceptional circumstances. According to military law, a property search may be conducted without a judge's authorisation when the inhabitant of the premises requires that the search is conducted or expresses approval for the search to be carried out.<sup>74</sup>

### *The judiciary's response: approving of spontaneous searches*

The judiciary has maintained through different rulings that property searches must be carried out in strict compliance with legal requirements; non-compliant searches become void, making the evidence collected invalid.<sup>75</sup> These rulings

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<sup>73</sup> The search warrant must be in written form and specify the places and people to be searched, the purpose of the search and the way in which the search will be conducted. After the search has taken place, a report signed by two witnesses must be submitted to the judge. Article 14 of the Mexican Constitution; article 61 of the Federal Code of Criminal Process.

<sup>74</sup> Article 482 of the Military Code of Justice.

<sup>75</sup> Non binding ruling titled: "Inspection carried out by the prosecutor practiced in a commercial premises open to the public (private address). To confiscate objects linked to a pos-

include the requirement that people appearing as witnesses should be different from those who act as assisting members of the prosecution or police.<sup>76</sup> Nonetheless, the SCJN validated property searches without judicial authorisation in cases of flagrant offences, that is, in cases where a state official witnessed the actual commission of an offence. The SCJN argued the police does not necessarily require a property search order to enter a private residence if that if delay may cause a void investigation, and evidence resulting from the entry of an authority into a residence without a search warrant, motivated by the commission of a flagrant offence, has full validity.<sup>77</sup>

This excerpt shows that legitimate property searches may be conducted without a judicial order. This may be with a reason for the rise in complaints about breaches of privacy and illegal detentions derived from property searches. Furthermore, the legal category of flagrancy has historically been used to facilitate the detention of suspects or possible offenders. In fact, over 90 percent of investigations brought before a court begin with the detention of possible offenders, on the basis that a flagrant offence was being committed, instead of beginning with an investigation which leads to arresting a suspect.

#### *Property search practices: searching without judicial authorisation*

Similar to *arraigo*, prosecution authorities are in charge of carrying out property searches and are most frequently accompanied by police or military officials. After the SCJN's ruling, property searches without a judicial order rose steeply. Based on complaints of human rights violations received, the CNDH reported that from 2006 to 2011 the police and military often carry out property searches without proof of illegal activity taking place (2011, p.2-3). Further, the CNDH found that police and military officials falsify the existence of flagrant offences to justify the searches by planting illegal objects in the searched premises, such as drugs or weapons (2011, p.20). As it will be shown in the following chapters, soldiers have drawn heavily on conducting property searches without judicial order to investigate crime, claiming a flagrant offence was committed.

From an overview of the pre-emptive measures discussed, it would appear that prosecutors, police and military officials, being part of the execu-

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sible offence found due to an illegal property search which after practiced without complying with article 16 of the Constitution, the collected evidence are consequently invalid and legally inexistent.”

<sup>76</sup> Non binding ruling titled: “Property search. Lacks validity if those appointed as witnesses of the property search are the same that appeared as attending witnesses.”

<sup>77</sup> Binding ruling titled: “Interference by the authority in a premise without a judicial warrant. Effectiveness of the carried out doings and of the collected evidence, when motivated by a flagrant offence”.

tive branch of government, seem to carry out pre-emptive measures habitually rather than exceptionally. Also, it appears that the legally established limits are often stretched to facilitate criminal investigations.

The judiciary before the constitutional reform in 2008 attempted to limit the pre-emptive ethos of crime investigation, but its efforts were disregarded by the other branches of power and so it modified its legal reasoning to conform with the reformed constitutional provisions. However, the endorsement of flagrant property searches contrasts severely to the initial effort to limit the use of *arraigo*, as it forfeited the need to conduct a property search authorised by a judicial authority. In practice this has meant to authorise law-enforcement agents to break into properties while obviating judicial intervention. Neuborne's finding (2005) of mixed results comes to mind, particularly given the apparently opposing underlying positions of trying to uphold civil rights and liberties while, in the other hand, enabling state forces to trespass into private property.

## Conclusion

I argued here that legal constructions contained in legislation, policy documents and judicial rulings endorse elements of enemy penology. The Mexican context illustrates enemy penology's criticisms. The coercive arm of the Mexican state has expanded, based on necessity to deal with all criminals. Crime has become a matter dealt by both civil and military state agents where a continuous process of militarisation is observed across organisational and operational settings, in the equipment and tactics used by state agents. At the same time, public officials' statements reinforced militarism ideas where society's anxieties and urge for safety may only be satisfied drawing on military intervention to eliminate enemies. Those who reject or disapprove of the current policy are seen as rejecting the nation itself. In a reciprocal manner, public attitudes appear to support a punitive response to conflicts, which may be explained by the high level of distrust in criminal justice officials. The Mexican society trusts in the military's involvement in crime control, even if that involvement relies on the reduction of civil liberties.

The judiciary endorsed military's involvement in public safety and crime control matters in 1996 and later on in 2000; this trend seems difficult to revert. At the same time, the SCJN validated the practice of property searches without a warrant or in flagrancy which facilitated the investigation of crime in private property. In practice, after the SCJN authorised the use of flagrant property searches, reports on violations of civil liberties increased. In contrast, the SCJN argued against the *arraigo* orders though did not prevent law-enforcement

agents from relying overtly on these to pursue crime investigations. The question remains, to what extent militarism has affected judicial behaviour and decision-making and whether this can be traced in judgements and interviews. In particular, the extent to which society's sentiments on the military are shared by members of the judiciary, and whether criminal proceedings have changed after the heightened military involvement. These are the main questions addressed in Chapter 9.



## The Mexican criminal justice system: actors and proceedings

### Introduction

Every relevant player within the Mexican criminal justice system, from police and public defence attorneys to prosecutors and judges, are entities undergoing reform. The main purpose of this research was to examine the judiciary, so this chapter gives background information that provides a context for the investigation of judgements and the interviews data set out in later chapters. This chapter will focus on the current situation. It will investigate the courts and the prosecution service, the rules applicable to criminal proceedings and sentencing, and other current practices, showing the background against which the views of judges were shared and illustrating the locations where written judgments were produced.

### *Structure of the Mexican courts*

The highest body within Mexico's federal judicial branch is the Supreme Court (SCJN), comprised of 11 appointed justices including the chief justice.<sup>78</sup> The federal judiciary is organised in 32 circuits across the country.<sup>79</sup> There are three main tiers or ranks of courts within the federal judicial system: the first instance or trial courts (398 courts), the courts of appeal (88 courts) and constitutional tribunals (221 courts).<sup>80</sup> In addition, specialised courts decide particular issues such as pre-emptive measures (seven courts) and other courts are established temporarily in particular areas of the country (79 courts).<sup>81</sup>

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<sup>78</sup> Mexico is a federal republic, divided into 31 states and the federal district of Mexico City. The federation is ruled by three branches of government: the executive branch, headed by the president, the legislative branch, formed by Congress and the Senate, and the judiciary, headed by the Supreme Court of Justice.

<sup>79</sup> The designation process of the 11 justices involves the candidates' nomination by the president and approval by two thirds of the Senate. (Article 96 of the Constitution)

<sup>80</sup> There are several federal judicial bodies that are not part of the regular structure, including the military courts which are organised and structured according to their own organic law.

<sup>81</sup> This information was retrieved from: <http://www.dgepj.cjf.gob.mx/organosjurisdiccionales>

First instance courts and courts of appeal at the federal level are headed by a single judge, whereas constitutional tribunals are comprised of three judges. Court of appeal and constitutional tribunal judges are called magistrates. Judges are first instance or trial judges, whereas the term magistrate is used to refer to judges further up the hierarchy within the judiciary; all have legal professional backgrounds. The Mexican system has no jury, so the judge rules on both matters of fact and of law. The judge determines the defendant's guilt or innocence and the applicable sentence.

First instance courts are organised by "desks," which are headed by a clerk called secretary who is normally assisted by two officials. Each desk handles a particular set of cases and is in charge of all procedural issues derived from those cases. The secretary traditionally conducts hearings, receives documentary evidence and drafts a judgment. This is later submitted to the judge for revision and approval. For example, more than half (52 percent) the federal convicts interviewed in 2012 said that the judge did not attend the initial hearing, and 38 percent of the interviewees thought it was the secretary was who had control over the hearings (Azaola & Correa, 2012).

Trial courts may specialise in a particular type of dispute, such as criminal, civil or administrative. This is the case in the HM state, whereas in courts in the LM state hear all types of cases. First instance courts also may review state decisions, submitted in the form of *amparo* proceedings which embed a legal action filed on the basis of purported constitutional violations. Constitutional tribunals decide other types of *amparo* than those resolved by first instance courts.

Traditionally in Mexico there have been two different types of *amparo* actions that, while based on a purported constitutional violation, pursue different outcomes and are aimed at different things. *Amparo indirecto* may be raised against all kind of administrative acts that are deemed unlawful, for example against tax laws, when those laws violate constitutional principles of taxation in Mexico; or against an illegal detention. *Amparo indirecto* is similar to the habeas corpus action. This *amparo indirecto* is filed before a federal first instance court, whereas *amparo directo* may only be filed, in general, against a final resolution issued within a procedure that followed the pattern of a trial before constitutional tribunals.

Courts of appeal in both LM and HM states hear all types of cases, including criminal appeals and review first instance judgments. In contrast, constitutional tribunals in both states specialise in criminal, administrative and civil matters. These tribunals analyse whether the last judgment (the one issued by

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the court of appeal) may have interpreted the law in a way that conflicts with constitutional norms. This legal action is an *amparo directo*. This amparo seeks a confirmation that the resolution in question did not violate the Constitution and constitute a review of the correctness of a prior resolution.

Constitutional tribunals may decide that constitutional protection or amparo should be granted because of procedural violations or error in law and send the case back to the lower court to correct the judgment. Also, the constitutional tribunal may decide that the defendant is innocent, contrary to the view of the prior judges, and acquit the defendant; this is known as awarding constitutional protection. Or it may simply confirm the lower court's decision. This remedy is not available to the prosecution. Constitutional tribunals have the highest position within the federal judiciary below the Supreme Court (scjn). Their position has two main implications: first, they act as a final instance, so their decisions are irreversible. Second, they can issue binding rulings which should be followed by all other courts, both courts of appeal and first instance ones. Appointments to these courts are based on examination. However, both circuit and district judges are appointed by the Supreme Court (Concha et al, 2007).

The federal judiciary has an administrative body, the Council of the Federal Judiciary (cjf), as explained in Chapter 1. The cjf became was entrusted with the career judiciary system installed in 1995. The career judicial system improved administrative working conditions (Guerrero, 1998). For instance, judges' selection and career advancement decisions began depending on merit evaluations rather than on connections or political ties. Also, discipline decisions and ratification of lower level judges, allowed judges to decide cases disregarding political powers of social influences and without fear of retribution. In addition, the cjf through the Judiciary Institute (Instituto de la Judicatura), became in charge of training candidates to occupy the different types of posts within the judiciary (Guerrero, 1998).

The reform sought better trained judges who would issue consistent and high quality decisions, having established a judicial career path and specialised curriculum under the cjf (Begn , 2007; Finkel, 2005, p.96). At the same time, granting these powers to the governing judicial institution set different incentives concerning career advancement, tenure and discipline. These persuaded judges to decide cases and issue resolutions in accordance with institutionally accepted values and based on what is thought to be sound legal reasoning within the judiciary (Finkel, 2005).

The judiciary's external independence was safeguarded through reforms in order to isolate it from political influence. Prior to the existence of the cjf, judges were suggested or recommended by a higher judge to decide a case in a par-

ticular manner, in other words, lacked internal independence to issue a decision (Begn , 2007; Finkel, 2005). Although the cjf remains distant from the judicial task, Begn  found that judges are not fully independent from the cjf as incentives and sanctions from the cjf exert influence on judges' decisions (2007).

Similar to other federal countries, each Mexican state has its own prosecution office and judiciary, formed of two tiers or ranks: first instance specialised courts headed by a single judge and courts of appeal presided over by three magistrates. The courts of appeal review first instance decisions, and parties may still challenge the judgment issued by the courts of appeal and file for a third review or *amparo directo* before a constitutional tribunal.

The main interactions between the two systems take place through amparo proceedings. Federal first instance courts review amparo indirecto proceedings against a state authority's decision, including issues of illegal detention. In contrast, constitutional tribunals review final judgments via *amparo directo* proceedings issued by both state and federal courts. The review of state judgments by federal judges is historically explained by a lack of confidence in local courts due to political influence and interference from the state government (Fix-Zamudio, 1976).

Federal courts are bound by federal legislation, but they are required to apply state rules during proceedings in which a state decision is being reviewed. During the transition period from a quasi-inquisitorial system to an adversarial one, the interaction between the federal and the state system became more complex as some federal judges, such as those in the HM state, had to apply adversarial rules and principles to review state criminal judgments but examine federal judgments through a quasi-inquisitorial lens. This was not the case where a state Congress, for example in the LM state, had not reformed the state's criminal legislation.

### *Structure of the Attorney General's office*

The office of the Attorney General is part of the executive branch of government. Although its central offices are located in the capital, Mexico City, there are delegations located across the country. These delegations are run by prosecution agencies in charge of crime investigation and its prosecution during pre-trial and court proceedings.<sup>82</sup>

Prosecutors rely on auxiliary entities to carry out their duties, including official experts who provide reports on matters such as chemistry, toxicology

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<sup>82</sup> Article 11 Organic Law of the Attorney General Office.

and ballistics.<sup>83</sup> These experts are based in the delegations and form part of the attorney general office, but their autonomy are expected to be objective and produce examinations despite being part of the prosecution.<sup>84</sup> Prosecutors tend to base their indictment on expert evidence produced by this auxiliary entity. Nevertheless, defendants may also rely on the same pool of experts if they require a particular report to be produced to make their case. Prosecutors also rely on the federal police force as another auxiliary entity to conduct investigations. Police officers are bound by prosecutors' instructions and authority.<sup>85</sup> In practice, however, it has been found that supervision of the police by the prosecutor tends to be minimal. This means that, in general, police findings are automatically signed off by the prosecutor, despite routine violations of rules on treatment of suspects and collection of evidence (Hammergren, 2007, p.32).

For instance, 54 percent of federal convicts interviewed in 2012 stated that they were threatened at the moment of their arrest; 65 percent said they had lost belongings during the arrest; and 57 percent stated that they were beaten, most commonly kicked (80 percent), punched (80 percent) and slapped (78 percent) (Azaola & Correa, 2012, p.62-63). Military personnel who participate in criminal investigations have a similar role to the police and have begun developing similar practices (Azaola & Correa, 2012).<sup>86</sup>

## Federal criminal proceedings

### *From pre-trial to final judgement*

Criminal proceedings are formally initiated at the prosecution agency when an offence is reported, either by the victim or by the police after arresting a suspect. This means the pre-trial investigation begins far from the courts of law. In general terms, a case reported by a victim or any other party requires the collection of enough evidence to allow the prosecutor to apply to a court for a warrant to arrest the suspect. These cases represent the minority of those that conclude with a final judgment. This is due to police ineffectiveness in arresting suspects and to weak and defective investigations (Pérez Correa, 2012). In contrast, the vast majority of cases that reach court and conclude with a final judgment began with the suspect's arrest. Police appear to routinely detain

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<sup>83</sup> Article 22 Organic Law of the Attorney General Office.

<sup>84</sup> Article 25 Organic Law of the Attorney General Office.

<sup>85</sup> Article 21 of the Mexican Constitution; Article 24 of the Organic Law of the Attorney General Office.

<sup>86</sup> HM Magistrate 1.

without a warrant, relying on the exception provided for criminals apprehended in flagranti (Hammergren, 2007, p.34). For this reason, I will devote more time to this type of proceeding.

Police officers, as well as any person with the nerve to do it, may arrest a suspect without a warrant, but only in cases of flagrancy, that is, if the suspect is caught in the act of committing the offence or while fleeing from the scene of the crime. Suspects may also be arrested based on a warrant issued by a prosecutor, as opposed to a judge, but only in cases of urgency, where there is reasonable grounds to believe that the suspect may abscond, put the victim or anybody else at risk, or destroy evidence.<sup>87</sup> In any event, the police must bring the suspect directly and immediately to the prosecution agency, where the suspect may only be detained for 48 hours, by which time the prosecution must either file the indictment and bring the suspect to court or release him and continue the investigation.<sup>88</sup>

The prosecutor is the leading authority during the pre-trial phase. S/he is in charge of collecting evidence aimed at “discovering the factual truth”, i.e., which is, whether the suspect is responsible for the offence reported to or by the police. In practice, the prosecutor tends to produce only incriminatory evidence, which includes the police report (*parte informativo*) describing how both the arrest and the alleged offence took place as well as the testimony of officers and other witnesses. The suspect generally gives an initial testimony which is used by the prosecutor. Other types of evidence include, in drugs cases for example, the official pharmacology report on the type and quantity of drug found and a toxicology report on the suspect. Nevertheless, the prosecutor must also take into account any exculpatory evidence.

The final document produced during pre-trial is the indictment dossier or case file containing both legal arguments and evidence produced. It is intended to convince the court there are sufficient grounds to claim the defendant should be tried for the charged offence (this document is called *pliego de consignación*). Pretrial investigation concludes either with the indictment’s submission or the decision not to press charges against the suspect. The prosecutor’s authority is significantly reduced when the case reaches the court as s/he ceases to act as a decision-maker, directing the procedure, and becomes one of two competing parties.

As first steps, the court asserts its jurisdiction to rule on the case and verifies whether the defendant was lawfully arrested and detained by the prosecutor.

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<sup>87</sup> Article 16 of the Mexican Constitution.

<sup>88</sup> Article 16 of the Mexican Constitution.

Then the court takes the suspect's initial statement (*declaración preparatoria*). In this initial hearing, the judge or court officials meet the defendant and read him his rights and notify him of the charges being brought and the existing incriminatory evidence. The court has 72 hours from the moment the prosecution files the indictment to decide whether there is sufficient evidence to try the defendant through intermediate resolution.<sup>89</sup>

The intermediate resolution contains an initial assessment of the evidence produced during pre-trial by the court. The pieces of evidence produced closer to the criminal event are granted greater evidentiary weight based on the "*principio de inmediatez*". As a result, judges apply this rule and therefore give greater relevance to that evidence produced closer to when the offence happened than the evidence produced later. Given that most cases are initiated with a police arrest, the police account of the facts plays a central role in the prosecution's case and ultimately in the outcome of the trial. Guilt or innocence is ultimately determined by the police who commonly arrested those deemed habitual criminals, regardless of whether they were actually responsible for the crime in question (Hammergren, 2007). The court is forced to release the defendant if the intermediate resolution is not issued within this period of time, and the judge might be subject to administrative or even criminal sanctions.

Another problem resolved by intermediate resolution relates to keeping the defendant in custodial remand. Once the judge determines which offences will be tried during court proceedings, custody is either ratified or reversed based on the seriousness of the offence. Trial judges are legally bound to ratify custodial remand of every defendant who is tried for a serious offence.<sup>90</sup>

If the judge decides the defendant will face trial in intermediate resolution, proceedings generally continue to evidence production, which may include confrontation hearings<sup>91</sup>, witness testimony, expert reports and documentation.

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<sup>89</sup> This period may duplicate in case the defence requires it. Article 19, Mexican Constitution.

<sup>90</sup> Custodial remand is a subject of study in its own right, particularly because 41 percent the Mexican prison population is on remand, in other words, awaiting trial or a verdict (México Evalúa, 2013). The abuse of custodial remand contravenes international human rights treaties and produces negative effects on defendants, their families and their communities, all of which have been raised and documented by many NGOs and scholars. Some of the NGOs are: México Evalúa, AsiLegal, Instituto de Justicia Procesal Presunción de Inocencia, among many others. Scholars include Magaloni, 2009 and Zepeda Lecuona, 2009.

<sup>91</sup> A confrontations hearing is held with the aim of clearing up any contradictions found by any of the parties –the prosecution or the defence–, concerning the defendant's statement and a witness' or co-defendant's statement. This is a hearing solicited by any of the parties or the court where those participating in the hearing are put face to face and directly confront the nature or content of the alleged contradictions. For example, if there are dif-

After all pieces of evidence have been brought before the court, prosecution and defence make their closing arguments, generally in writing. Finally, the judge issues a verdict concerning both the defendant's guilt or innocence and the applicable sentence.

Trial courts must handle cases within strict periods of time. Not only must the intermediate resolution be issued within 72 hours but trials should conclude within the following four months if the prison sentence would be below two years; or within a year, if the potential sentence would be longer. Nonetheless, proceedings may be postponed for reasons such as further evidence collection or a pending appeal. In any case, the workload within first instance courts is handled within rigorous time frames, affecting the way proceedings are managed and the quality of the final decisions.

Both the defendant and the prosecutor may file an appeal against the verdict. The court of appeal reviews the first instance judgment and may confirm, modify or revoke it. If the defendant is unsatisfied with the appeals judgment, he may file for a further review by a constitutional tribunal through the *amparo directo* proceedings. Courts of appeal and constitutional tribunals examine the suit based on the dossier or case file created during the pre-trial investigation and the one prepared before the first instance judge. These high court judges rarely hold hearings or receive further evidence except for legal arguments made by the prosecutor and defence, generally submitted in written form. Hence, they have barely any contact with the parties involved, as opposed to trial judges.

Another important difference lies in the fact that courts of appeal and constitutional tribunals examine cases without legally established deadlines, so they tend not to face any time pressure to issue their resolutions; this does not necessarily lead to better decisions, however, as judges continue to be evaluated in terms of statistics and not necessarily in terms of the quality of their judgments.

### ***Written files and judgments***

Case files in the Mexican judicial system contain all documents produced during the proceedings. A judicial case file is opened by the court assigned to the case. It includes all documents produced during the trial as well as those generated by the prosecution during pre-trial, such as the hearing transcripts, expert reports and all interim orders issued by the court. The case file attempts to contain the case in a fashion that will allow a completely different judge, unconnected to the original proceedings, to issue a verdict.

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ferent versions of how the arrest occurred, the defendant can confront the police officer who participated in his arrest.

The written case file facilitates secrecy as access is only permitted to those recognised parties involved in proceedings. As mentioned in Chapter 1, victims were not recognised until recently to have a place and role in proceedings so they were not allowed to access the file. Another feature of the written form of proceedings touches upon the fact that evidentiary weight is granted to whatever was documented by the parties, most likely the prosecutor. As a result, only what is paper-based is taken into account by the court even if was produced during pre-trial without any judicial oversight. Ultimately, any allegation is only significant if has written support (Carbonell & Ochoa, 2009). Consequently, whoever decides what it is included in the casefile has enormous power over the way proceedings are conducted and ultimately on what can be demonstrated in trial.

A written judgment, the source of the archival analysis in this project, generally includes a transcript of oral evidence produced during all proceedings, or at the least the relevant sections of these, together with the judge's analysis of the evidence and final decision. Such a detailed judgment follows the same logic as the case file: it can be examined by any other court or judge who was not present during the proceedings, such as the magistrates in the higher courts.

## Sentencing guidelines

Initially, the Mexican Constitution established that the main sentencing value was to “regenerate” those who were convicted (Sarre, 2011).<sup>92</sup> Addressing the sentenced ones as morally degenerated or depraved beings changed in the sixties as the new purpose of sentencing became to “readapt” sentenced people on the basis that they needed psychological treatment. In 2008, the Constitution was reformed again and changed the sentencing aim from the readaptation ideal to the reinsertion (or reintegration) of interns to society. The reform sought to leave behind moral and psychological labels and focus on that the sentenced ones were not simply inserted in society. At the same time, the purpose of reinsertion of those in prison was to incorporate into prison facilities access to education, training and labour opportunities, access to medical attention and to cultural and sports activities, leaving behind the premise of treating them therapeutically (Sarre, 2011).

An underlying purpose of the reform was to shift penitentiary laws from punishing the offender to punishing the offence (Sarre, 2011).<sup>93</sup> As a result,

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<sup>92</sup> Article 18 of the Mexican Constitution.

<sup>93</sup> In Spanish, *Derecho penal de autor* and *Derecho penal del acto*.



judges are instructed to disregard the defendant's personality or their alleged dangerousness.<sup>94</sup> However, this shift has not been fully completed as sentencing rules established in criminal legislation instruct judges to bear in mind ways in which the offence took place and also the defendant's personal characteristics.

### *Sentencing general rules*

Criminal legislation establishes general rules that must be followed by judges when determining the severity of the sentence.<sup>95</sup> The same legislation details each offence and the applicable sentencing tariff, which may include different types of penalties such as custodial or financial. Judges deciding the length of the sentence must take into account the seriousness of the offence, the victim's character and the defendant's degree of culpability. They must also bear in mind aspects related to both the offence and the offender. Aspects relating to the offence include the degree to which the protected rights were damaged or the degree to which those rights were imperilled by the offence, the nature of the action and the means used to offend, and the manner, including time and place, in which the offence happened. The judge also takes into consideration offenders' personal aspects, such as the extent to which he participated in the offence, his literacy level, age, habits or customs, socioeconomic background, motivation to offend and behaviour after committing the offence.

In cases of recidivism, the sentence may be increased and parole benefits denied. Recidivism should only be considered when determining the quantum or length of the sentence, and not taken into account when examining offenders' culpability.<sup>96</sup> Habitual offenders may also be punished more severely if they are convicted for several occasions for the same type or nature of offence.<sup>97</sup>

Judges tend to go over these guidelines explicitly in their decisions. Nonetheless, after the case file analyses, it was found that most judges do not go into examining each of these aspects in depth but rather consider the defendant's characteristics together with the type of offence. Hence, their reasoning of what motivated a particular sentence tends to be absent, or superficial at best. Only a few judges described the way specific aspects, such as a vulnerable background or recidivism, had led to a more lenient or harsher sentence.

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<sup>94</sup> HM Magistrate 3.

<sup>95</sup> General sentencing rules are established in Articles 51 and 52 of the Federal Criminal Code.

<sup>96</sup> The offender is deemed recidivist if the new offence was committed within a short period of time after the last conviction. Articles 20 and 65 of the Federal Criminal Code.

<sup>97</sup> Article 22 of the Federal Criminal Code.

In parallel to the general sentencing guidelines, some offences require judges to consider aggravating or mitigating factors. For instance, in drug-related offences, if the offender is a public servant or if drugs are supplied in schools, the sentence is significantly increased.<sup>98</sup> In contrast, for instance, if the offender is a farmer, functionally illiterate and from a vulnerable economic background, and is charged for growing a particular type of drug, his sentence is lower than that imposed on any other farmer.<sup>99</sup>

### *Sentencing guidelines on drug offences*

Sentencing tariffs on drug offences have become harsher over the last 50 years. In the 1950s and 1960s the sentence for drug dealing was between six months and seven years in prison. The tariff began to increase in the 1970s, and by the 1990s, the minimum punishment had increased to between 10 and 25 years (Uprimny Yepes, Guzmán, & Parra Norato, 2012). In contrast to the general trend, sentencing tariffs on certain drug offences were significantly modified in 2009. The change in sentencing was part of a new set of rules that sought to distinguish drug users and small-scale drug dealers from large-scale drug traffickers, based on the quantity and type of drug (Zamudio Angles, 2011).<sup>100</sup> Prior to the reform, both small-scale and large-scale drug traffickers were punished alike. For example, the applicable sentence before the reform for possession with intent to supply ranged from five to 15 years, whereas afterwards, the tariff ranged from three to six years for small-scale dealers and five to 15 years for large-scale traffickers.<sup>101</sup>

The quantity and type of drug were decisive elements used to distinguish drug users from drug traffickers. Based on the quantity, it was determined by law whether the drug was intended to be supplied to others or used by the offender. If the amount of drug, as determined by the toxicology report, could be used on a single occasion and exclusively by the offender, the defendant was guilty of simple possession. If the toxicology report stated that the confiscated drug exceeded this amount, the drug was intended for supply, whether the of-

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<sup>98</sup> Article 196 of the Federal Criminal Code.

<sup>99</sup> Article 198 of the Federal Criminal Code.

<sup>100</sup> Other important changes were made, such as allowing local criminal justice personnel--police, prosecutors, courts--to investigate and eventually hear minor drug cases, rather than restricting case to federal institutions. The context of this reform was a national agreement to fight low-scale drug trafficking widely referred to as *narcomenudeo*. (Zamudio Angles, 2011)

<sup>101</sup> See Tables 4.1 and 4.2.

fender was a ‘street peddler’ or high-profile drug trafficker.<sup>102</sup>

After the reform, a judge could distinguish between drug users, low-scale dealers and large-scale traffickers. Quantities were modified so that the threshold between drug users and small-scale dealers changed, as well as that between small-scale and large-scale dealers. For example, the sentence of possession with intent to supply lowered if the quantity remained below a specific threshold which was the basis to presume the defendant was a low-scale supplier. By comparison, if the quantity exceeded such a threshold, the applicable sentence was the five to 15 years as the defendant was deemed a large-scale trafficker.

One of the effects was that a greater number of defendants were charged for possession with intent to supply, as opposed to simple possession, because the quantities presumed to be for personal consumption were reduced (Pérez Correa, 2012). Another effect was that sentences were significantly reduced. This meant both a shorter stay in prison and being offered parole benefits, which became available because the custodial sentence was below four years.<sup>103</sup>

## Overlaps between the Mexican quasi-inquisitorial system and enemy penology

Up until now, several overlaps between the Mexican quasi-inquisitorial system and enemy penology may be identified. In an attempt of pinning down some similarities and differences, I will need to make no distinction between principles and practices as the distinction between these is blurred by the significant divide between the written law and documented practice.

First, enemy penology is largely sustained on pre-emptiveness. To incapacitate possibly dangerous offenders is justified in an enemy penology paradigm based on that they might commit a serious offence. The ultimate aim is to prevent dangerous offences from taking place so the restriction of allegedly dangerous offenders’ freedom is needed. Mexican laws establish that any re-

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<sup>102</sup> Several binding rulings instructed the judge to rely solely on the medical report to decide whether intent had been demonstrated, for example, the ruling titled: “Drugs offence. Possession, non-application of article 199 of the Federal Criminal Code”. However, in 1996 another binding ruling was issued by the First Chamber of the SCJN, which indicated the judge had to consider other aspects, such as the amount and nature of the drug, way in which it had been acquired or supplied, and the suspect’s or defendant’s degree of addiction. This binding ruling is titled: “Possession of drugs destined to the immediate and exclusive use of the drug addict. The excusable established in article 199 of the Federal Criminal Code, it is not subject to any temporary conditions”.

<sup>103</sup> Article 90 of the Federal Criminal Code.

striction to civil liberties should be exceptional and for the least possible length. However, a strongly preventive ethos persists in the frequent use of *arraigo* orders discussed in Chapter 3 and the generalised use of custodial remand. The underlying goal seems to be to detain suspects first and try them afterwards or, worse, try them first and incapacitate them just in case they are indeed found guilty. In 2006, 43 percent of the prison population across the country was facing criminal proceedings (AMNU, 2007). This percentage has remained roughly constant: by 2013, those incarcerated waiting for their verdict represented 41.3 percent of the total population (México Evalúa, 2011). Many scholars, such as Zepeda Lecuona, have concluded that custodial remand is an expensive, highly pervasive and ineffective measure that nonetheless is overtly used by Mexican criminal justice practitioners (2009). As a result, enemy penology overlaps with Mexican practices of affecting suspects' liberty before are tried.

Second, in the enemy penology model, convictions of alleged dangerous offenders are facilitated by reducing procedural safeguards which otherwise would be enforced. The ordinary Mexican criminal justice system –not the special regime that governs organised crime proceedings- does not formally limit the scope of the defence's rights or any procedural safeguards during proceedings. However, the defendants' possibilities of being acquitted are reduced by legislation and rulings which altogether facilitate convicting them. For instance, procedural rules and precedents instruct judges to give preponderant evidentiary weight to sources of evidence produced closer to the criminal event, as instructed by the principle of *inmediatez*. This principle guarantees that evidence produced by the police, who tends to eye-witness the offence taking place, is granted greater relevance in trial, facilitate convictions. In consequence, these rules and principles indirectly convert police testimonies in the version of the facts courts rely to decide the case (Pásara, 2006). In addition, the conviction rate of nine out of ten verdicts is difficult to match with that prosecution services are described to be systematically ineffective.<sup>104</sup> To unravel this puzzle, if you like, one must bears in mind the following pieces: pre-trial proceedings are conducted by the prosecutor without any judicial oversight; evidence produced in earlier stages (i.e. pre-trial) of proceedings have greater weight than that produced later on in trial; essentially no further incriminatory evidence is produced during trial, and the vast majority of cases end up in convictions. By putting these pieces together, it follows that procedural rules are geared to facilitate convictions. These themes are discussed in detail in the next chapters.

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<sup>104</sup> By scholars such as Magaloni, 2009, and by the vast majority of interviewees, as discussed in Chapter 7.

However, for the purpose of this discussion, it could be argued that enemy penology and the Mexican criminal justice system are similar in that in both models convictions are facilitated, the Mexican in a permanent basis whilst enemy penology in an extraordinary or exceptional basis.

In regards to sentencing, Jakobs argues that sentencing dangerous offenders deemed enemies pursues their elimination through particularly severe punishment as a way of eliminating risk and reinstating the validity of the law to other members of society. By comparison, Mexican sentencing aims are expressly focused on the reinsertion, previously rehabilitation of interns. At the same time, although sentencing tariffs have become more severe in general terms the sentencing tariffs that apply to drugs offences were significantly reduced in 2009. It may be argued that this change does not endorse enemy penology because punishment to defendants who could arguably fit into the enemy description – charged for drugs related offences-, was lowered significantly but only for drugs users and low-scale drug dealers. Still, sentencing tariffs for high-scale drug traffickers remained unchanged. It could then be argued that Mexican sentencing is attuned to traditional penology and thus distant from enemy penology. Otherwise, sentencing drug trafficking offences, according to enemy penology, given the urgent need to respond to such offences, would involve high sentencing tariffs, but in reality the law changed to offer more lenient sentences for different types of drug traffickers.

In sum, some essential pieces of the current criminal justice legal framework resemble enemy penology, such as the general trend of initiating trials without prior investigation; enforcing rules and precedents that pave way to convicting defendants; and the overt abuse of custodial remand. Although facilitating convictions and enforcing prevention strategies to incapacitate suspects are enemy penology's essential traits, it is difficult to argue that these characteristics foster treating defendants as enemies in the Mexican context. These practices are hardly exceptional and have long been in place, to the extent of being part of the legal fabric. In this regard Zaffaroni argued that enemy penology was a useful analytical device in cases where civil liberties were normally enforced, as opposed to places such as Latin America, where any suspect is treated as harshly as an enemy and his civil liberties systematically curtailed through mechanisms such as custodial remand (2011).

I contend that the theoretical framework of enemy penology is helpful in examining judicial decision-making and judicial behaviour, including practices that embed ways in which convictions are facilitated and pre-emptive measures overtly used, even if these practices are systematic and not exceptional. Ultimately, defendants may not be thought of as enemies but perhaps they are

systematically treated as such which altogether enhance arbitrariness and give the state the upper hand over suspects or defendants. In addition, enemy penology is useful in learning about the judiciary, while taking notice of context in which judges are immersed in. As argued in Chapter 3, policies and practices carried out by the other two branches of government show a heightened use of coercive and militarised measures to respond to crime, akin to the enemy penology paradigm which may affect judicial decision making.

## Conclusion

This chapter aimed at presenting an overview of the most relevant aspects in criminal trial proceedings. The structure of the courts was described in order explain the hierarchy within the judiciary which acquires significance throughout the empirical discussion, particularly because judges from different ranks were interviewed. The specific role and duties entrusted to each type of judge's rank were explained because these, together with their daily workload and past experiences inform each interviewees' commentaries. Also, the Attorney General's office structure was briefly explained in order to explain the relationship between prosecutors, police officers and military members, and experts, all of whom produce relevant evidence during proceedings, as will be illustrated in Chapter 7.

In addition to explaining judicial and prosecution structures, the main stages of criminal proceedings were described, since an offence is reported to the stage where a final judgement is issued. Sentencing guidelines were briefly discussed, particularly those that govern drugs related cases. This overview aims to present the backdrop of the discussion of empirical findings contained in the following chapters. Also, a rough overview of general trends of (mal)practices is useful before zooming in to examining 40 judgements from two different locations, and the voices and views of several judges.

A final note reviewed the overlaps between enemy penology and the Mexican quasi-inquisitorial system. Several commonalities were found such as both systems' proclivity to incapacitate suspects, and the existence of rules and precedents geared towards issuing a convictions.



Table 4.1 Maximum drug doses legally authorised

Before reform			After reform		
Drug	Allowed quantity of drug presumed for immediate and personal consumption	Presumed quantity to be sold by small retailers ( <i>narcomenudista</i> )	Allowed quantity of drug presumed for immediate and personal consumption	Presumed quantity to be sold by small retailers ( <i>narcomenudista</i> )	Presumed quantity to be sold by large-scale traffickers
Marijuana	250 g.	*	50 mg	Above 50 mg and less than 50 kg	Above 50 kg
Cocaine	25 g (Clorhidrate of cocaine) 250 mg (Sulfate of cocaine)	*	500 mg	Above 500 mg and less than 50 kg	Above 50 kg
Heroin (diacetyl-morfine)	1 g	*	50 mg	Above 50 mg and less than 50 kg	Above 50 kg
* The criterion followed by the courts was that the intent of selling or distributing drug was presumed if the quantity of drug could not be consumed exclusively by the defendant on one single occasion. It was supported by the toxicology expert's report is produced in court aiming to determine whether it exceeded what the defendant could consume immediately and by himself.					

\* Based on Table 1, Appendix 1 of the Federal Criminal Code.

\*\* Based on Article 479 of the Public Health Law.



Table 4.2 Sentencing tariffs before and after August 2009

Offence before reform	Offence after reform	
There was no distinction between small retailers and larger drug traffickers	Small retailers (presumed, based on quantity, i.e. greater than 5 mg but lower than 50 kg)	Large-scale traffickers (presumed, based on quantity)
Offence: Simple possession		
The prosecutor will not press charges against the drug user who carries an amount allowed for his immediate and personal consumption (art. 195 FCC)	The prosecutor will not press charges against the drug user who carries an amount allowed for his immediate and personal consumption (art. 478 PHL)	Four years to seven and a half years, and 50 to 150 days of fine, when intent cannot be proved (art. 195 bis FCC)
Ten months to four years three months, and 50 to 150 days of fine <sup>1</sup> , when intent cannot be proved and no organised crime can be associated. Sentence depends on the quantity and the type of drug (art. 195 bis FCC)	Ten months to three years, and 80 days fine, if quantity exceeds the minimum amount for immediate consumption and intent cannot be proved (art. 477 PHL)	
Offence: Possession with intent to supply		
Five to 15 years in prison and 100 to 300 days of fine (art. 195 FCC)	Three to six years in prison, 80 to 300 days of fine (art. 475 PHL)	Five to 15 years and 100 to 300 days of fine (art. 195 FCC)
Offence: Commerce		
Ten to 25 years in prison, and 100 to 500 days of fine (art. 194 FCC)	Four to eight years in prison, 200 to 400 days of fine (art. 476 PHL)	Ten to 25 years in prison and 100 to 500 days of fine (art. 194 FCC)

\* Offences committed by small retailers are established in the Public Health Law (PHL), whilst those committed by other offenders (carrying greater amounts of drugs) are written in the Federal Criminal Code (FCC).

## Tools for examining judicial behaviour

### Introduction

The question of how judges adjudicate ordinary criminal cases while simultaneously responding to an emergency context—the ‘safety crisis’ described above—lies at the core of this enquiry. The aim of the study is to investigate whether judges endorse security policies underscored by the idea of a ‘war on organised crime’ or limit the effects of these policies on suspects’ due process rights. The analysis of judgements and first-hand accounts given by judges from different courts and tiers can be better understood through the different approaches developed to explain judicial decision-making and judicial roles. These approaches form the subject-matter of this chapter and encompass a variety of theories that attempt to explain and predict judicial decision-making, judicial role conceptions, how precedents are formed and adhered to, ways in which inquisitorial and adversarial approaches account for judicial decision-making. The chapter then addresses the links between these theories and the theory of enemy penology discussed in the previous chapter.

### Empirical theories of judicial behaviour

Chief Justice Marshall stated in the nineteenth century:

Courts are the mere instruments of the law and can will nothing. When they are said to exercise discretion, it is a mere legal discretion. [...] Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature....<sup>105</sup>

This view resonates with legal formalism, which sees law as a rational, seamless and complete system of norms within a consistent hierarchical structure (Bix, 2005; Tumonis, 2012). Legal formalism drew on the school of thought known as legal positivism, which was developed in the nineteenth century in Europe,

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<sup>105</sup> *Osborn v. Bank of the United States*, 22 U.S. 9 Wheat. 738 738 (1824) Quoted in Spaeth & Segal, 2002, p. 10.

principally by philosophers Hans Kelsen, John Austin and H.L.A. Hart. These legal philosophers developed a conceptual theory of law analytically isolated from disciplines and considerations of morality or justice (Bix, 2005). In a context where the legal system is deemed to be complete, judges do not make law, because there is no need (Tumonis, 2012). Rather, judges apply a general rule to the facts of the case in a rational and deductive manner, and their duty is limited to discovering and announcing the law by consulting primary and secondary rules of the legal system (Tumonis, 2012).

In contrast to Chief Justice Marshall's assertion, Justice Oliver Wendell Holmes held: "the life of the law has not been logic; it has been experience" (1881). Legal realism was a movement that emerged in the U.S. in the twentieth century in which legal practitioners, as opposed to philosophers, reacted against the dominant school of thought of legal formalism (Leiter, 2005; Tumonis, 2012).

These legal practitioners argued that the rational application of legal rules does not fully explain judicial decisions, particularly those issued at the appellate level (Leiter, 2005). Accordingly, the law is indeterminate, as more than one legal conclusion may be drawn from one principle. Also, the law is thought of as indeterminate given the existence of conflicting but equally legitimate canons of interpretation for precedents and statutes that may be applied to one case (Leiter, 2005, p.51). Realists held that legal reasons fell short in explaining what actually accounts for judicial decisions. What explains rulings is beyond the law; considerations of fairness, as well as psychological, political and social factors, exert influence on the final decisions (Leiter, 2005).

Realists viewed natural science as the paradigm of all genuine knowledge. They therefore emulated the methods of natural science, testing hypotheses against observation of the world (Leiter, 2005, p.50). Although realists initially lacked evidence and methods to test their hypotheses, judicial empirical studies developed from realism. According to Heise, the legal realism movement provided the first significant forum for the intersection of applied social science and legal scholarship (2002, p.822).

The predominant scholarship on judicial behaviour developed in the United States (Thea, 2012), arguably due to the rise of the realism movement but also possibly due to judges forming law embedded in precedents, which is rooted in the common law tradition. Most studies have focused on the Supreme Court of Justice and to a lesser extent on federal courts of appeal and state supreme courts (Epstein and King, 2000; Epstein, Landes and Posner, 2013; Heise, 2002). Recently, many scholars have begun examining the federal appellate judiciary within the American justice system, as it is the most likely source for Supreme Court appointments (Cross and Lindquist, 2009).

Prior to the 1940s, many American scholars believed that justices were motivated to follow precedent, disregarding their personal views (Epstein & Knight, 1998). Judicial studies were sparked by C. Herman Pritchett's inquiry on American justices' dissents, concurrences and block votes. Pritchett questioned the legalistic assumption of judges aiming only at reaching a correct decision. His work led the way to suggest that justices are motivated by goals other than applying the law accurately, such as their own preferences (Epstein & Knight, 1998; Segal & Cover, 1989).

Several models emerged to explain what 'real' factors explain judicial decision-making; those which dominated judicial decision-making scholarship were behaviouralism and attitudinalism (Heise, 2002, p.833). Other models, such as the strategic, the managerial or the legalistic, gained relevance later on. The question of whether judges decide solely on the basis of the law or make decisions based on their personal background or ideology, to further particular policies or to reduce their workloads, is at the core of the different models developed within judicial studies. These attempt to understand, examine and even predict judicial decision-making.

### *Behavioural models*

Behavioural models emphasise the relevance of the following aspects on judicial behaviour: personal attributes or social backgrounds, policy-oriented values and attitudes, roles and small group influences (Epstein and King, 2000, p. 630; Heise, 2002). The first refers to a range of political, socioeconomic, family and professional background characteristics that help explain the formation of particular attitudes. The second involves political attitudes towards issues raised in cases. The third perspective suggests that normative beliefs held by judges about what they are expected to do limit judicial attitudes or directly affect judicial behaviour. The different roles judges may play is examined more closely in a separate section of this chapter. Finally, the fourth determinant holds that the behaviour of judges on collegial courts is affected in some way by face-to-face interaction (Epstein and King, 2000, p.630).

Behaviouralist scholarship conceptualised the votes of judges as responses to stimuli provided by cases presented to them, where the determinants described above could allegedly be traced in the stimuli (Grossman and Tanenhaus quoted by Epstein and King, 2000, p. 630-631). Even if behaviouralism models viewed judges as policy seekers, judges were thought to further their goals with reference to their own normative and policy-based attitudes rather than referencing other relevant actors' actions and institutional settings (Epstein and King, 2000).

### *Attitudinal theory*

This approach claims that judges' decisions are best explained by their ideology. Studies focusing on this theory examine judicial decisions through the lens of the politics of appointment and confirmation of judges by the president and of partisanship (Friedman, 2005; Heise, 2002). So, for instance, affiliation with the Democratic party or being appointed by a Democratic president may predict liberal patterns of voting behaviour by a specific justice.

One main difference between behavioural and attitudinal models is that the former uses socioeconomic background characteristics to explain judicial behaviour, while the latter believes judges' socioeconomic background informs their ideology but that it is ideology that exerts influence on their votes (Heise, 2002). Accordingly, attitudinalists hold that judges act directly on their policy preferences where law does not constrain judicial behaviour (Friedman, 2005) and without much thought of the consequences of their choices (Baum, 2006, p.7).

The attitudinal approach received wide acceptance and was conventionally followed by scholars before the strategic model was developed. Nevertheless, the predictive capability of attitudinalism was weak due to the circularity of measuring judicial attitudes in votes that had been already issued. In this regard, Segal and Cover sought to trace justices' values through external materials such as newspaper editorials and correlate this with their votes in civil rights cases (1989). This method was adopted by several scholars; for instance, Segal et al. used it in order to include other types of cases, such as economic regulation, and a larger group of justices from earlier periods (Segal, Epstein, Cameron & Spaeth, 1994). Although they found the attitudinal model had strong predictive power for more recent judgements, they noted the limitations of the model when analysing previous court judgements and suggested including other potential determinants of the justices' decisions to redefine ideological variables. They also noted the need to bear in mind changes in the legal, political and social landscape (Segal, Epstein, Cameron & Spaeth, 1994).

The attitudinal and behavioural models neglected important political and institutional features and actors which also exert influence on judges; these factors included the president, legislatures, interest groups, lower courts, and judicial institutions (Friedman, 2005). In particular, the attitudinal approach falls short when examining collegial courts as it focuses on individual judges. Understanding judges as strategic actors, as opposed to actors deciding purely on ideological grounds, was the approach that replaced the attitudinal model (Epstein & Knight, 1998).

### *Strategic model*

A strategic approach to examine and predict judicial decision-making emerged with Pritchett's study, but this model flourished many years later (Epstein & Knight, 2000). Pritchett's approach highlights the relevance of interdependent relations between judges and other actors including Congress, the president, other judges within a collegial court and those in lower and high courts (Epstein & Knight, 2000). At the same time, this model considers that the institutional context plays a part in explaining judicial choices.

Explaining judicial decision-making with a strategic model relies on three basic assumptions: first, justices' actions are directed towards the attainment of goals and interests, so alternative courses of action are examined in terms of the outcomes they will produce (Epstein & Knight, 1998). Second, judges bear in mind others' preferences and possible courses of action in order to maximise their own preferences and ultimately attain their goals. An example of this would be whether court of appeal judges modify their rulings to avoid reversals from the Supreme Court (Barnes & Songer, 2009). In other words, they act strategically, which may or may not reflect their immediate preferences, in order to advance their views or to avoid results that depart even further from their preferences (Epstein & Knight, 1998, p.12-17; Robbennolt, MacCoun & Darley, 2008, p.3). Third, judges, like any other strategic actors, make decisions within a set of institutional rules (Epstein & Knight, 1998, p.17).

The initial advocates of this approach, Epstein and Knight, assume that a major goal pursued by justices is to see their preferred policy positions reflected in law, so their actions will advance such an objective (1998, p. 11-12). In contrast, other scholars, such as Baum, suggest that the variety of goals pursued by judges acting strategically is diverse, ranging from enacting good policy on particular issues, enhancing political preferences and institutional legitimacy, to personal career advancement and self-respect (Baum, 2006, p. 6-7). Further, Robbennolt, MacCoun and Darley argue that judges pursue diverse, disparate and often conflicting goals simultaneously (2008, p.2-3).

Strategically oriented judges consider the effects of their choices on collective outcomes, both in their own courts and in the broader judicial and policy arenas. They therefore bear in mind not only the case at hand but also possible consequences, such as guaranteeing consensus on a different case or preventing Congress from enacting legislation that will reverse or limit the desired policy (Baum, 2006, p.6-7). For example, collegial court judges need to moderate their views to achieve consensus even to the extent of voting contrary to their personal views in order to further their preferred policy (Friedman, 2005, p.282). Multiple actors are taken into account, including colleagues and peers within

the judiciary as well as other branches of government, such as Congress, the general public and interest groups. As a result, a strategic judge is subject to influence from a variety of sources (Baum, 2006, p.6-7).

In sum, this model conceives justices to be strategic actors who realise that their ability to achieve goals is dependent on the preferences of others, the choices they expect others to make, and the institutional context in which they interact (Epstein & Knight, 1998, p.xii).

### *Traditional or legalistic*

The traditional or legalistic model assumes that judges aim to interpret the law accurately or reach the correct decision according to precedent (Robbennolt, MacCoun & Darley, 2008). It assumes that judicial decisions are determined by “the law”, conceived of as a body of pre-existing rules established in constitutional and statutory texts and previous decisions of the same or a higher court (Posner, 2008). Ideally, judicial decisions are the product of a syllogistic endeavour in which written law supplies the major premise, the facts of the case supply the minor one and the decision is the result or conclusion that follows (Posner, 2008). Disputes are thought to be decided based on the facts submitted before a court (Segal & Spaeth, 2002). At the same time, legalists expect that legal decisions made by judges do not depend on their personality or on politics but rather on the case file (Friedman, 2005; Heise, 2002).

Taruffo argues that syllogistic reasoning such as this helped to disguise the judge’s responsibility, making him or her a passive actor who merely executes guidelines set by a different, more empowered actor (2003). As a result, as Posner claims, those who internalise the “official” line need not explain their decisions (2008). “Interpretation, based on a set of rules of interpretation, becomes a rule-bound activity purging judicial discretion” (Posner, 2008, p. 40-41).

In the middle ground, scholars who support this model give policy considerations a place but note that legal considerations come into play, because judges decide cases within a legal framework (Baum, 2006).

### *Managerial model*

The managerial model emphasises the impact of increasing workloads in judges’ behaviour at all levels (Robbennolt, MacCoun, & Darley, 2008). Managerial judges are thought to be concerned with saving time, reducing delays and improving efficiency as a response to increasing workloads that hamper judicial legitimacy and credibility (Resnik, 1982-1983; Robbennolt, MacCoun & Darley, 2008). At the same time, managerial judges contend that procedural changes, including discovery issues and incentives to reach settlement, together with



new rights and remedies, have enhanced pre-trial and post-trial judicial supervision (Resnik, 1982-1983). In sum, this model contends that judges devote substantial amounts of time to case management (Resnik, 1982-1983, p.403).

Managerial judges concern about efficiency, together with institutional incentives related to judicial performance. Judges as case managers strive to limit their workloads, despite the fact that their tasks and demands may vary across different types of courts and different jurisdictions (Robbennolt, MacCoun & Darley, 2008).

### *Using a combination*

These four models attempt to examine judicial behaviour and give a coherent account of judicial decision-making. Baum, along with practising judges such as Kozinski and Posner, believes that these models ignore a premise often left unquestioned: judges are not solely focused on furthering good policy or good law but are also motivated by personal interests. These interests include self-respect and recognition within the judiciary and amongst those audiences significant to them (Baum, 2006; Kozinski, 1993; Posner, 2008). “Judges exercise their powers subject to very significant constraints... the first, and to my mind the most significant, is internal: the judge’s own self-respect” (Kozinski, 1993, p.72). Posner also believes judges exercise discretion in such a way as to be recognised by themselves and others as good judges rather than lazy or wilful ones (Posner, 2008, p.174).

Other scholars, such as Robbennolt, MacCoun and Darley, claim that judicial behaviour cannot be understood from a single perspective, for this would oversimplify the many constraints or incentives that judges face at the moment of deciding (2008). Judges and courts vary amongst themselves and have different goals and objectives that they attempt to achieve within a range of constraints specific to each judge and court (Robbennolt, MacCoun & Darley, 2008). To hold that certain policy goals, ideological views or managerial objectives are more valid than others is to show only partial understanding of judicial decision-making (2008, p.2-3). Robbennolt, MacCoun and Darley rather suggest that different types of goals and actions come into play at the same time, which if portrayed in a parallel constraint satisfaction model may be examined more clearly, observing both the advantages and disadvantages each judge faces in specific circumstances. Links between goals and actions need also to be considered (Robbennolt, MacCoun & Darley, 2008). This thesis draws on all these approaches, because, as will be discussed in the empirical chapters, the interview material reveals that many different concerns and interests affect judges, ranging from contributing to reducing impunity to avoiding reversals and lightening workloads.

## Judicial role

Attitudes and policy preferences (i.e. liberal/conservative attitudes; pro-defendant/pro-public attitudes; personal sense of justice) were examined as predictors of decisions issued by judges by scholars. However, a new strand of research unfolded once scholars such as Becker (1966), Vines (1969), Glick (1971), Glick and Vines (1969), Gibson (1978) and Scheb, Ungs and Hayes (1989) found that attitudes were meaningful in predicting decisions only if role expectations or orientations were also taken into account. For instance, Gibson argued that judges' attitudes were meaningful in predicting a particular decision only when those judges felt that drawing on their personal values was acceptable, based on their conception of what constituted proper judicial behaviour and what was expected from them (1978).

Role expectations are defined by what constitutes 'proper' behaviour for a role occupant, based on conceptions each one may have (Gibson, 1978, p.917). Role expectations exert particular influence on actors in positions subject to relatively unambiguous institutionalised role expectations, such as judges (Gibson, 1978, p. 917). Role orientations are normative expectations shared by judges and related actors regarding how a given judicial office should be performed (Howard, 1977 quoted in Scheb, Ungs & Hayes, 1989, p.427); or what judges think they ought to do (Gibson, 1983 quoted in Scheb, Ungs & Hayes, 1989, p.427).

At the same time, roles may differ between judges, and even when norms are widely accepted, the actual behaviour of a judge may not conform to them (Becker, 1966; Ungs & Baas 1972). Thus, 'purposive role' refers to the expectations a judge has in regards to his own particular position or function (Ungs & Baas, 1972; Vines, 1969). These include: a judge's characterisation of his job; the purpose or goal he pursues as a judge; and the major criteria he considers in reaching his decision (Ungs & Baas, 1972, p. 345).

### *Purposive roles*

Based on interviews with state court judges from four different states, Glick and Vines (1969) distinguished four purposive roles: the ritualist, the adjudicator, the policy-maker and the administrator. Subsequent studies, such as those conducted by Ungs and Baas (1972) or by Flango, Wenner and Wenner (1975) built upon these purposive roles.

1. The ritualist refers to judges preoccupied with the everyday routine of the judicial process, including settling cases and managing workloads. Ritualist judges avoid policy involvement or concerning themselves with the problems of the political system (Vines, 1969, p. 468).

2. The adjudicator judge concentrates on the function of settling disputes and coming to a decision through proceedings in court, including hearing the parties and studying the briefs (Vines, 1969, p. 468). The adjudicator sees his function as a mediator, balancing contending principles to bring order and fairness to society (Ungs & Baas, 1972, p. 346). The judicial role is seen more broadly, as it encompasses the search for peaceful solutions, determining each party's rights. The judge is a key actor in the judicial process. The law is used as a tool to achieve objectivity and creativity, allowing broader social issues to be settled (Ungs & Baas, 1972, p. 356).
3. Policy-maker refers to judges who see policy-making functions embedded in the process of controlling the activities of lower courts. In their view, their role is more than simply following precedent; they establish policies which are enforced on lower courts and the litigants involved (Vines, 1969, p. 469). The policy-maker perceives himself as balancing larger social issues rather than settling individual disputes (Flango, Wenner & Wenner, 1975).
4. The administrator judge sees the role of the court as supervising the development of law as well as other lower courts by providing guidance and establishing rules of practice and procedure that must be followed by those courts (Vines, 1969, p.469). For the administrator, judicial procedure is very important; the way in which a case is decided is as relevant as the actual decision made. Administrators see precedent as a means of assuring the reliability of the justice administered to litigants as opposed to the required criterion for decisions (Ungs & Baas, 1972, p.347). Administering justice also involves maintaining a clear docket or trial list and avoiding delays in deciding cases (Ungs & Baas, 1972, p.357).

The most common orientation found was the ritualist, followed by the adjudicator (Vines, 1969, p. 473). This finding is consistent with what Ungs and Baas (1972) and Flango, Wenner and Wenner (1975) found.

One of the most controversial aspects of the judicial role was whether judges could apply the law without being influenced by their personal values, or whether they inevitably fell back on their own values (Vines, 1969, p. 473). A similar query was pursued by Becker, who examined how judges handled precedents to learn about individual perceptions of judicial roles (1966). He found that judges who viewed precedent as an extremely important factor in judicial decision-making could exhibit a degree of objectivity when confronted by a clear precedent (Becker, 1966, p.680). On the other hand, a judge's perception

that precedent was not very influential in the final decision might lead to a more subjective decision (Becker, 1966, p.680).

### *Decision-making roles*

Glick and Vines (1969) developed three categories of decision-making role when looking at whether judges conceive their role as being limited to interpreting the law or extended to making law. These roles are: the law interpreter, the law maker and the pragmatist, which have also been enriched by further studies (for instance, Flango, Wenner & Wenner, 1975 and Unga & Baas, 1972).

1. The law interpreter is a pure interpreter of the law. Legal precedents comprise the major criteria in the interpreter's decisions; precedent, therefore, is a major constraint of personal predilection (Unga & Baas, 1972, p. 345). Law interpreters' goals are expressed in terms of preserving the existing law as an institution. To step outside the law, either by interpreting the constitution in line with a judge's own values or by performing a policy-making activity, would mean contravening the constitution and the separation of powers doctrine (Vines, 1969; Unga & Baas, 1972).
2. The law maker believes that judges make law when they decide cases (Vines, 1969, p. 475-6). The law maker considers that his or her personal attitudes and experiences are important factors when making decisions. His goal is to pursue what he thinks is just or right when deciding a case and for this purpose may shape precedent to fit with public policy. Hence, the judges as law makers include policy-making functions (Flango, Wenner & Wenner, 1975; Unga & Baas, 1972). A judge in this category may also suggest to the legislature a course of action it may adopt or send a copy of relevant opinions with the expectation that the legislature might act on the recommendations (Vines, 1969, p. 483).
3. The pragmatist agrees with both law interpreter and law maker but believes a judge must be flexible and match the settlement of the case to the specific circumstances and issues (Glick & Vines, 1969, p. 146; Vines, 1969, p. 476). For Flango, Wenner and Wenner, the pragmatist resembles what they call "the mediator", who places less confidence in relevant precedents and relies much more on his own common sense and understanding of the meaning of justice to reach his decisions, rather than public needs or desires (1975, p. 284).

The law-interpreter orientation received strong support from a large proportion of judges (Flango, Wenner & Wenner, 1975; Unga & Baas, 1972; Vines,

1969). This tendency was also found by Flango et al. in two civil law countries, Austria and Switzerland (Flango, Wenner & Wenner, 1975). Vines (1969) and Glick & Vines (1969) found that this orientation was much more common in Louisiana, where the state legal system is based on the French legal tradition. Initially they considered that this legal tradition explained the general acceptance of the law-interpreter orientation. However, they discarded the influence of their legal tradition because they found that the civil law tradition is no longer shaping court decisions; they observed that respondents made no reference at all to their legal tradition. They concluded instead that Louisiana's conservative state politics and environment, which do not encourage changing the status quo, accounted for this orientation (Glick & Vines, 1969; Vines, 1969). Similarly, they found that state politics in New Jersey, where judicial activism had been encouraged, accounted for judges accepting the law-maker orientation (Glick & Vines, 1969; Vines, 1969).

Ungs and Baas examined whether the level or tier of court was associated with judges' role orientation. They initially expected trial judges to be aligned with the administrator orientation, interested in procedure and clean dockets or trial lists (1972). By comparison, they expected appellate judges to align more with the law-maker orientation, in which creative decisions are more common (Ungs & Baas, 1972). They found no conclusive relationship between the perception of roles and the tier of court (Ungs & Baas, 1972, p. 362-3).

Whether judges make law or are limited to interpreting the law is an ongoing discussion. Scholars such as Segal and Spaeth suggest that claiming that judges are restrained from deciding the law is self-deceptive at best (2002). Judges, whether at the highest or lowest court, make law: they allocate resources, either to the parties involved in the case at hand or to a larger group of people affected by the decision (Segal & Spaeth, 2002). These authors claim there to be a "panoply of mythology" surrounding judicial decisions, in which judges and their decisions are objective, impartial and dispassionate (2002, p.10). In a similar vein, Zaffaroni—former justice of the Argentinian Supreme Court—held in an interview in 2015:

The judge is a human being and citizen who has the same interests and wants to participate as any other. Impartiality is the main attribute of independent justice. Impartiality is not the idealisation of a judge, like a sort of superman, apolitical, non-ideological, and asexual. If within justice there is someone who pretends to be as such, he ought to go to the Himalayas.<sup>106</sup>

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<sup>106</sup> Interview published in newspaper La Jornada on April 28<sup>th</sup>, 2015.

The Mexican judiciary has traditionally embraced the legalistic model, in which judges are considered mere appliers and interpreters of the law (Caballero & Concha, 2001). The legalistic model is reinforced by a limited margin of discretion; judges are bound not only by strict norms but also by rulings issued by higher courts that constrain decision-making, as will be explained below. Nevertheless, the 2011 human rights reform led judges to question their law-interpreter role, because the reform allowed judges to disregard norms if they considered that these norms contravened human rights treaties. The extent to which this reform will modify the way in which judges perceive their orientation and role remains to be seen.

## Precedent

Becker argues that judges' preference for strict or flexible adherence to precedent sheds light on their perceived role (1966). At the same time, the way in which judges understand their role involves normative expectations that also inform institutional behaviours despite the diversity of judicial orientation and performance. This section describes precedent doctrines and precedent formation in common law systems and in Mexico (a civil law system) and discusses precedent adherence.

### *Precedent doctrines*

Precedent can be broadly defined as a decided case that furnishes the basis for deciding future cases involving similar facts or issues (Lindquist & Cross, 2005). There are two main doctrines of precedent: *stare decisis*, developed in common law jurisdictions, and *jurisprudence constante*, developed in civil law (Fon & Parisi, 2006). The *stare decisis* system developed in England. A key aspect was the extraction of a rule from prior cases of principle, defined as general doctrine, to guide future decisions (Lindquist & Cross, 2005). As these principles guide a court to reach a resolution in similar cases, the presence of several cases recognising the same legal principle increased the persuasive force of judicial Findings (Lindquist & Cross, 2005). Precedents became more authoritative when they were reaffirmed by a sequence of consistent decisions over time, until they became a primary source of law (Fon & Parisi, 2006, p.521).

By comparison, civil law countries thought of case law as secondary to written codes and special legislation, which were deemed primary sources of law (Fon & Parisi, 2006, p.522). In 19th-century continental Europe, the doctrine of the separation of powers was thought to imply that courts should solve disputes brought before them, not make laws or regulations. This historical re-

striction is explained by the monarchy's distrust of empowered courts during the French Revolution. The ideals of certainty and completeness in law implied that legislative provisions had to be established as mathematical canons, leaving no room for discretion or arbitrary decisions made by the judiciary (Fon & Parisi, 2006, p.522).

Civil law jurisdictions gradually began to develop an informal precedent system, where a sequence of comparable cases acquired persuasive force as a source of law. This system sought to promote the certainty, consistency and stability in the legal system that codifications had failed to achieve. This led to the doctrine of *jurisprudencia constante*, under which a court is required to take past decisions into account only if there is sufficient uniformity and repetition in previous case law. As a result, considerable precedential authoritative force stems from a consolidated trend of decisions on any legal issue (Fon & Parisi, 2006, p.522; Posner, 2008, p.144-5).

### *Forming Mexican precedent*

Mexican rulings or precedents may be authoritative or binding, which is called *jurisprudencia*, or only persuasive or indicative. Mexican *jurisprudencia* may concern an interpretation of a written norm or the content of a principle embedded in legislation or the Constitution. Binding rulings are mainly formed in two ways: by contradiction or by repetition. Contradictions are addressed by circuit panels (formed by constitutional tribunal magistrates in the circuit) or by the National Supreme Court of Justice (scjn) when contradictions arise between constitutional tribunals or within the scjn's chambers on a legal issue.<sup>107</sup> If a decision is reached by eight out of 11 justices of the scjn, it becomes binding on all courts in the country. By comparison, if consensus is not reached, the authoritative character of the decision is lessened and held to be only persuasive. Repetition relates to consolidating a trend of decisions. An authoritative precedent is formed after five rulings ratify a particular reasoning in the same direction. These rulings can be issued by constitutional tribunals, circuit panels or the scjn. Initially, the scjn had the exclusive duty of forming *jurisprudencia*, but after 1968, constitutional tribunals were also allowed to form *jurisprudencia* (Ovalle Favela, 1999). The fact that a wide range of constitutional tribunals can form binding precedents helps explain the current diversity of *jurisprudencia* (Ovalle Favela, 1999).

Mexican *jurisprudencia* can be terminated by interruption, elimination or

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<sup>107</sup> Rules contained in the new Ley de Amparo published in the Federal Official Diary on 2 April 2013.



substitution. A *jurisprudencia* is interrupted after a legal reasoning explaining why it should no longer be applicable is accepted by the SCJN. Elimination happens when the written norm from which the judicial interpretation stemmed has been derogated or eliminated; and substitution happens when a higher court decides a *jurisprudencia* is substituted once a lower court produces sufficient legal argument asking to replace a particular ruling with different judicial criteria (Alvarado Esquivel, 2013).

Rules on the scope of binding rulings or *jurisprudencia* foster verticality, uniformity, legal certainty, continuity and control over lower-tier courts (Alvarado Esquivel, 2011). At the same time, the fact that parties may file for an appeal and have their case heard by Constitutional Tribunals or the SCJN represents an opportunity for these high courts to control lower courts and thus ensure consistency in decision-making (Guarnieri, Pederzoli, & Thomas, 2002). For instance, a primary rule dictates that all *jurisprudencia* must be followed by all lower courts, which illustrates the extent of vertical power and control from higher courts to the lower ones (Taruffo, 2003). If a particular ruling was issued by a constitutional tribunal, all courts below it, including courts of appeal and trial courts from both state and federal systems, are required to follow it. Those exempt from this binding force are courts from the same tier or hierarchy or from other circuits if the precedent is issued by a circuit panel (Alvarado Esquivel, 2013). Unless a binding ruling has been substituted, lower courts are bound to apply *jurisprudencia* and cannot disregard them even if extensive legal arguments are produced (Alvarado Esquivel, 2011). A different rule states that all *jurisprudencia* since June 1917 are binding if applicable to the case at hand, despite having been issued in a completely different era (Alvarado Esquivel, 2011).

### *Adherence to precedent*

Despite the fact that precedent traditions have different origins, scholars such as Taruffo maintain that differences based on judicial adherence to rulings, both binding and non-binding, have dissolved (2003, p.35-6). In this regard, it seems helpful to draw on both traditions to explore judicial behaviour concerning adherence to previous rulings or adherence to consensus within collegiate courts.

Dissent within collegiate courts was discouraged amongst U.S. justices in the nineteenth century, based on the assumption that the Constitution's meaning was already established (Friedman, 2005). Nowadays, justices are free to express their own views either in concurrent opinions or dissents; nonetheless, there is substantial pressure to obtain an opinion that speaks for "the Court" (Friedman, 2005, p.282).

Different explanations for why judges follow precedents have been advanced over time. The judiciary has traditionally fostered reliance and confirmation of precedents because it enhances coherence in interpretation of the law (Alvarado Esquivel, 2011; Lindquist & Cross, 2005). Adherence to precedent has been pursued because it fosters legal stability and continuity (Heise, 2002; Lindquist & Cross, 2005). Following precedents also encourages legal certainty and equal treatment of all parties (Alvarado Esquivel, 2011; Taruffo, 2003). In addition, precedent adherence shapes judicial decision-making and constrains judicial discretion (Lindquist & Cross, 2005; Alvarado Esquivel, 2011). As Heise points out, choosing not to follow precedent would undermine the practice of deciding by precedent and thus undermine the value of judges' own decisions (2002, p.840).

Epstein and Knight suggest that a general norm favouring precedent exists, and that justices who seek to establish legal rules that will engender compliance in the community will give priority to rules that are consistent with a norm respecting precedent (1998). Apparent or truthful reliance on precedent maintains the judiciary's authority and legitimacy (Lindquist and Cross, 2005). Lindquist and Cross suggest that following precedent is best explained in terms of path dependence, which describes a system where an initial decision influences subsequent decisions to the extent of an earlier ruling dictating the outcome of a later decision (2005). Repeated reliance on precedent reinforces the precedents' own significance and makes change burdensome, even if the content of the precedent is less likely to produce stability and predictability (Lindquist and Cross, 2005). In fact, Lindquist and Cross claim that path dependence may become pathological, perpetuating precedents and producing adverse societal consequences for no other reason than adhering to precedent (2005, p.1172). Even if a precedent is not binding, if it is deeply woven into the fabric of the law, judges may apply it, making it difficult to overrule (Lindquist & Cross, 2005; Posner, 2008; Taruffo, 2003).

At the same time, adherence to precedent embodies a strategy to limit workloads, as it avoids revisiting resolved legal questions (Lindquist & Cross, 2005; Posner, 2008; Taruffo, 2003). Posner claims that adherence not only reduces the amount of fresh analysis that judges have to perform but also lowers the chance of reversal (2008, p.144-5).

A common critique of the Mexican system of creating *jurisprudencia* is the wide and often conflicting range of rulings that result (Alvarado Esquivel, 2013). Posner holds that judges are reluctant to overrule decisions in order to preserve the appearance of continuity and stability, even if this means selectively using certain precedents and ignoring others (2008). In consequence, case

law is littered with inconsistent precedents from which judges can pick and choose. This may explain why the more precedents there are in an area of law, the greater role ideology plays in judicial decision-making (Posner, 2008, p. 45).

Bureaucratic or career judicial systems such as the Mexican enhance consistency through different mechanisms. Appointments and promotions are based on examinations, work experience and performance within the judiciary (Guerrero, 1998). Having good knowledge of *jurisprudencia* plays a significant role in this. Current and future judges are also trained in a specialised institute (Instituto de la Judicatura) focusing on providing skills in weighing evidence, developing legal arguments and drafting judgments (Guerrero, 1998).

Verticality and uniformity are stressed within the judiciary; lower courts are expected to follow existing precedents to the extent of explicitly reproducing them, inhibiting any kind of creative or innovative legal reasoning. Publicly fostering the following of rules, a lack of creativity and low variance, according to Posner, will typically be found in a career judiciary system such as Mexico's, where promotion largely depends on conforming to higher-rank courts' criteria (2008). In a career judiciary the quality of a judge's rulings is evaluated by his superiors to determine when, if at all, he is promoted (Posner, 2008, p. 131). Such a system is unlikely to see supervisors benefiting from having bold, intellectually challenging and experimentally inclined subordinates (Posner, 2008). As a renowned justice claimed: "*jurisprudencia* translates practically into a format or 'template' for lower tier court resolutions; [judges] only need to adjust their decisions to the format and that's it!" (Alvarado Esquivel, 2011, p.32).

## Inquisitorial vs adversarial approaches

An analytical approach to understanding the role of judges and their political significance suggested by Guarnieri, Pederzoli and Thomas is by examining the division of tasks and powers among the various trial participants (2002). Procedural rules shape the ways in which proceedings are conducted and at the same time shed light on the resources allocated to each of the participants involved and the extent to which each of them influences the development of a case (Guarnieri, Pederzoli & Thomas, 2002, p.121).

For instance, judges within an adversarial criminal procedure are expected to act as passive arbiters whose main functions are focused on ensuring a fair trial. The attorneys, by comparison, are leading actors; they prepare and present the case, define factual and legal issues, interrogate witnesses before and during trial. In contrast, within inquisitorial settings, the judge has control over

the entire process, including in some cases controlling preliminary or pre-trial proceedings and interrogating parties and witnesses. The attorneys hardly ever intervene (Guarnieri, Pederzoli & Thomas, 2002, p. 122).

The legal process may also help analyse the roles performed by the parties involved if it is examined as an instrument used by the state to establish or reaffirm general values, principles and objectives beyond individual disputes (Guarnieri, Pederzoli & Thomas, 2002, p. 123). Adversarial proceedings mirror the conception of a liberal state concerned with individuals' rights and their autonomy, where parties are relatively equal contenders and the judge a neutral third party. Conversely, inquisitorial proceedings mirror an interventionist state where a public official, such as a judge, takes over a private dispute and reaches a decision bearing in mind the interests of the whole community (Guarnieri, Pederzoli & Thomas, 2002, p.123).

Judicial decision-making is also affected by the relationship between judges and other key actors such as the public prosecutor or the police (Guarnieri, Pederzoli, & Thomas, 2002). For instance, if judges and prosecutors are part of the same professional body, public prosecutors are more influential than their counterparts—defence lawyers—who lack connections to the judge. Also, the relationship is shaped by legal proceedings and practices, such as those within criminal proceedings where the prosecutor plays a prominent role during the pre-trial stage (Guarnieri, Pederzoli, & Thomas, 2002). Or, if prosecutors are subordinated to the executive, as they are in the Mexican system, the judicial system is potentially influenced by the executive. In sum, the scope of judicial power varies in accordance with the way in which proceedings are structured, bearing in mind the underlying ideology of proceedings and relationships between judges and other actors.

The Mexican criminal justice system, as explained in previous chapters, is mainly inquisitorial; the prosecutor plays a determining role in pre-trial and trial proceedings. The prosecutor's relevance is shown by aspects such as the weight incriminating evidence collected during pre-trial has in the final outcome of the case or in the fact that the charges pressed by the prosecutor generally shape the subsequent course of the trial. Based on Guarnieri et al., the salience of the prosecutor reflects both the reduced scope of judicial power in adjudicating guilt and the ability of the executive to exert influence on judicial decision-making.

Mexico's authoritarian heritage is mirrored in its current criminal justice system. Disputes are addressed by state officials, by the prosecutor who represents society and since recently also victims, and by the judge, who is in charge of proceedings. Nonetheless, the criminal justice reform attempts to modify these settings. On one hand, the prosecutor and the defence attorney are ex-

pected to have equal opportunities to present and defend their case before a judge. And, on the other, the judge is expected to have a less active role in proceedings while having a stronger oversight over the parties' doings. Ultimately, the state's influence in proceedings is expected to be lessened by, on one hand, levelling the field between the defence and the prosecutor, and by reducing the judge's active involvement in proceedings.

## Conclusion

This chapter explored the image of judges as purely objective, impartial and detached decision-makers. To claim that these qualities characterise everyone who performs judicial tasks disregards personal interests such as one's own ideology or attempts to further good policy. Moreover, to neglect the importance of everyday life, such as managing workloads and seeking recognition and respect from peers and other salient audiences, would render a partial and short-sighted understanding of judicial behaviour. This thesis does not subscribe to a particular theoretical model but rather bears in mind, as Robbennolt, MacCoun and Darley suggest, that many goals and interests come into play simultaneously. As interviews will show, accounts shared by judges shed light on this diversity, despite the fact that Mexican judges are traditionally conceived within the traditional or legalistic model.

The politics of precedent highlights the relevance of institutional goals such as continuity, coherence and legal certainty. The underlying agenda of enhancing vertical control within the judiciary and furthering particular rulings or precedents, even if outdated or simply wrong, reduces lower-tier judges' discretion and is an effective means of ensuring coherence. Also, strict precedent adherence prevents a particular ideology or policy being furthered.

The Mexican judiciary is a hierarchical bureaucracy formed within a civil law tradition. Like similar systems elsewhere, uniform decisions are rewarded and creativity discouraged. Traditionally, judges have been considered to be law interpreters within a formalist legalistic approach. Nonetheless, there may well be differences amongst judges' personal role orientations, and their judicial performance may vary despite the wide acceptance of institutional norms, as suggested by Unga and Baas (1972).

At the same time, the criminal justice reform, which seeks to modify the roles and practices of the actors involved in court proceedings, will necessarily alter the way in which resources and powers are distributed. The human rights reform pursued in recent years arguably represents a turning-point; judges will

need to adapt to a new decision-making function that involves not only interpreting and applying but also making law.

The current landscape, as described in previous chapters, is characterised by a safety crisis of impunity and crude violence, a landscape in which enemy penology values are shared and promoted by the federal government. In this context, it is interesting to examine what purposive roles are shared by judges; for instance, whether they see themselves as not involved with the social context or rather committed to settling particular disputes, or whether they perceive themselves as key actors in providing order or peace.

At the same time, the context as it is begs an analysis of what decision-making functions are shared and perceived by judges who are currently settling cases from the trenches. In particular, it will be interesting to learn to the extent to which Mexican judges have embraced the notion that during emergency conditions judges endorse the government's intrusive policies, or to the contrary, whether judges protect rights and liberties with even greater rigour.

Prior to discussing the empirical material consisting of judgments and interviewing materials, the next chapter describes the methodology used in order to explain and clarify the methodology design, the different strategies to collect and analyse the empirical material.



## CHAPTER 6

# Methodology

### Initial hypotheses and research questions

Enemy penology embodies a particularly punitive and pre-emptive approach to criminality. Its main elements are to define offenders (and potential offenders) as enemies, to deploy pre-emptive strategies to incapacitate them; to suppress certain procedural rights in the hope of facilitating convictions; and to impose disproportionate sentences in order to exclude offenders from society as long as possible. I have argued throughout the previous chapters that the enemy penology paradigm is found in the Mexican legal regime that governs organised crime related offences including drug-trafficking; validated by the legislative and executive branches of power. At the same time, the on-going process of militarisation reveals a more coercive treatment to offenders publicly characterised as enemies. In sum, I have argued that the legislative and executive branches of government have advanced an enemy penology model, so the question of whether the judiciary, through decision making and behaviour validates and reproduces enemy penology is the question that this thesis seeks to answer.

To detect changes in judicial decision making and behaviour, I relied on enemy penology's theoretical framework to compare two sets of judges, one set located in an unchanged environment, and another in a war-like context. Enemy penology guided a large part of the data collection and initial analysis of the data. The main research questions were: is the federal judiciary applying an enemy penology model when deciding ordinary criminal cases? If so, which elements of the model and under what circumstances? Addressing these questions involved asking whether judges saw defendants as enemies, whether they were curtailing procedural rights in judicial proceedings or imposing disproportionate sentences. At the same time, the main research questions opened up several underlying questions including: is judicial behaviour and judicial decision-making affected by the environment? Are the judiciary influenced by public statements and security policies? If so, in what ways?

To answer these general questions, I used a comparative case study analysis. The goal was to compare judges located in a relatively unchanged environ-



ment where militarisation had hardly occurred (referred to as having a low degree of militarisation) with those in a part of Mexico which was affected by violent offending, that had become heavily militarised in a short period of time and where soldiers participated in crime investigation and encountered violent criminal groups in a frequent basis (referred to as having experienced high militarisation). These judges were immersed in a political context in which the president and senior officials claimed that war was being waged against criminals, akin to a warfare context, hence I initially expected that this influenced judicial decision-making and judicial behaviour. The hypothesis was that judicial decision-making in the highly militarised (HM) environment would be more affected by enemy penology than the less militarised (LM) environment. This was not sustained by the evidence, consisting of a systematic analysis of trial courts' judgements and semi-structured interviews, as will be discussed in Chapters 7, 8 and 9. However, the conceptual frameworks on judicial behaviour and judicial roles were used to examine judges' accounts in depth. The methodology chosen and the research design are explained here. Also, the selection of the states or embedded cases of study are described here. The data collection process and analysis strategies used for each type of data are the main themes addressed in this chapter. A final note on language and ethics is included at the end of the chapter.

## Methodology

### *Doctrinal analysis vs. socio-legal tradition*

Legal scholarship may be understood as an interpretative discipline in which argumentative, logical, normative and empirical elements may overlap (Van Hoecke, 2011). Doctrinal analysis may take the form of examining the law's content and scope in reference to other bodies of law, judicial practice or principles, focusing on issues of legal coherence (McCrudden, 2006). The contrasting approach investigates how the law works in its real context, rather than its place within the broader legal system. Socio-legal studies engages with other disciplines, such as sociology, psychology or economics, and often draws on methodologies from these disciplines (McCrudden, 2006). This research is distant from the doctrinal tradition because the main inquiry is concerned with legal practice rather than the law itself. In addition, context is highly relevant in this study, because the study's guiding interest is to explore both judicial behaviour and judicial decision-making in criminal cases within the current Mexican context, aiming to understand the influence the context exerts, if at all, on the way criminal cases are decided.

### *Positivist vs. qualitative approach*

The positivist tradition advocates the application of natural science methods to the study of social phenomena, relying on hypotheses and variables, testing knowledge and verifying it through evidence (O’Leary, 2010). Positivism claims that science, including social science, can be conducted in a way that is value-free (Bryman, 2008). In contrast to positivism, understanding social phenomena through interpretation, rather than testing, stems from a qualitative tradition (O’Leary, 2010). Social reality, as opposed to objects of study examined by natural science, is considered to embody constructed meanings; therefore, human behaviour is studied as a product of how people interpret and understand their reality (Bryman, 2008). Social phenomena together with its meanings are constructed and advanced by social actors, shaped by social interaction (Bryman, 2008). The qualitative approach is mainly concerned with the way in which social meanings, discourses, and others, are interpreted, experienced and (Mason, 2002).

The present research relies on a qualitative approach with social interaction and social interpretation of reality at the core of the enquiry. The meaning that social actors, particularly judges, give to laws and policies in Mexico is the main interest of this research. Analysing formulated and recorded judgements as objective units of analysis, and viewing judges as neutral actors insulated from personal interest, political ideology, or the current context, would only render a simplistic and superficial understanding. In addition, diversity of perspective is covered and alternative or negative cases are also considered (Lewis & Ritchie, 2010, Sarantakos, 2005).

Qualitative research is a contested research approach compared to social research conducted with a scientific method rationale (Snape & Spencer, 2010). Positivist studies are considered rigorous when their findings prove to be valid, reliable and replicable. Research is valid when the data analysed relates to the concepts examined; it is considered reliable when methods and techniques are used accurately enough that the results can be replicated. Findings that are valid, reliable and replicable may permit generalisations which allows comprehensive explanations, on the basis of the research (Mason, 2002). Whether these concepts can be applied to qualitative research is a topic of on-going debate.<sup>108</sup>

For the purpose of this research, the limitations inherent in qualitative research were addressed through describing in detail all strategies, decisions and difficulties encountered during the data collection and data analysis. This al-

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<sup>108</sup> For an overview of main claims see: “Generalising from Qualitative Research” by Jane Lewis and Jane Ritchie in *Qualitative Research Practice*, edited by Ritchie, Jane; Lewis, Jane, Sage, 2010, London.

allows the reader to assess the evidence and the conclusions (Sarantakos, 2005, p. 86) in an attempt to produce a quasi-replicable study. ‘Good practice’ is sought through transparency and the continuous revision that the categories used to analyse the data have been consistently and rigorously applied (Lewis & Ritchie, 2010). I aimed to guarantee that the fieldwork was consistent and the analysis systematic by carrying out regular checks on the way in which data was collected and analysed (Lewis & Ritchie, 2010, p. 272).

## Research design: a case study

This research used human experience to answer the research question. The core aim was to gain an in-depth understanding of the judiciary through a case study drawing on qualitative methods of data collection and analysis.

### *Case study method*

‘Case study’ refers to a research method in which a unit of analysis—here, the judiciary—is studied in depth and informed strongly by its context (Yin, 2009). The case study is preferred as a method for assessing contemporary events. This research is mainly focused on present events: current judicial behaviour and judicial decision-making. Context is paramount to the core of the study because, on the one hand, the judges are part of a bureaucratic institution which at the same time is part of government, and is affected to some extent by the judiciary’s administrative settings as well as by other branches of the government; on the other hand, judges live and work in a social context informed by mass media messages, social attitudes and their own experience. As a result, their role and decisions may be influenced by different sets of pressures. The case study allows in-depth analysis of the judiciary, while taking notice of the context in which they interact.

The case study method is useful when the context and the object of study overlap or are not easily distinguishable (Flyvbjerg, 2011; Yin, 2009). This overlap implies that a range of variables are present together with multiple sources of evidence (Yin, 2009). This research draws on views and experiences shared by judges and other interviewees that concern both present and past experiences lived in various locations, views on the political and legal landscape, and perceptions of peers’ behaviour, which at times shed light on the object of study and at others to the context.

A common criticism of the case study method is generalisation: that analysing a case limits the scope of the findings to a general or broader context (Bryman, 2008; Flyvbjerg, 2011). This study suffers from this shortcoming, as

the number of judgements that were examined, and the states or circuits that composed the comparative case study, are not a representative sample, which means that generalisability is limited. I attempt to compensate for this by analysing judgements and interviews in depth and also drawing on findings from other studies that have examined the judiciary

A case study design may be single-case or multiple-case (Yin, 2009). The type of case selection relates directly to the aims of the research. For instance, if the objective is to acquire the greatest amount of detail of a given phenomenon, atypical or extreme cases may reveal more information than average or representative cases. In contrast, random samples of cases may help to avoid systematic biases and allow generalisation (Flyvbjerg, 2011). The selection of “variation cases” allows for obtaining information about the significance of differences in circumstances for both case process and outcome (Flyvbjerg, 2011).

A multiple-case study does not require a unique type of case, such as an extreme or representative case, but rather uses contrasting data from different cases in order to reach more compelling findings. Multiple-case studies may also vary from having embedded cases to analyse to engaging in assessing cases in a comprehensive way (Yin, 2009). Hence, the case study allows focusing on a unit of analysis in depth, while allowing embedded cases within the research as a whole.

This research will use an embedded multiple-case design with two “variation cases”. In both cases, the embedded units of analysis—federal judges in two different locations—share important commonalities: they belong to the same judicial institution (the federal judiciary), follow the same sets of rules (federal criminal law and federal criminal procedural law) and are bound by the same body of precedents, both binding and persuasive, so that the cases brought before these courts are decided using the same norms. Though each and every judge may differ from each other, the variable element within the case study design is that one set or unit of judges is physically located in an unsafe environment, as opposed to the set of judges located in a safer place. In addition to these sets of judges, other members of the judiciary, other court officials, academics and NGO members were interviewed in order to gather further insights.

### *Selection of embedded cases*

The selection of embedded cases followed a theoretical sampling rationale, which refers to selecting a sample of particular characteristics relevant to the research enquiry and the theoretical model used (Mason, 1996, quoted in Silverman, 2010, p.144). In this case, the active involvement of the army in crime

investigation is strongly related to the enemy penology model, because it is through militarisation that this paradigm is advanced.

Military bases are spread across the country in many if not all states. This research is not concerned with the permanent presence of the army but with the operatives deployed to assist civil authorities, mainly police forces, in crime control initiatives. By the end of 2011, military forces had been sent to assist civil forces in eight states: Baja California, Chihuahua, Durango, Guerrero, Michoacán, Sinaloa, Tamaulipas and Nuevo León. One of these was used as the unsafe case otherwise referred to the highly militarised (HM) state. The state with the relatively unchanged environment, where the growth of militarisation and a steep rise in violence and criminality were not experienced so directly is referred to as the low militarised (LM) state. In addition to using theory to select the embedded units of analysis (judges in the HM state and judges in the LM state), considerations relating to access and comparability were also relevant.

### *Access*

I had several connections in the chosen states which facilitated interviewing judges, members of NGOs and academics. On the one hand, I grew up and lived in the LM state until 2003, which meant that access was initially negotiated through existing personal and professional contacts. On the other, I had acquaintances in the selected HM state, including NGO members dedicated to criminal justice reform, and also personal networks that helped in providing a safe space in which to negotiate access. My strong social and professional networks in both capital cities provided receptive settings from which to embark on successful fieldwork; these connections influenced my selection of states.

Gaining access to judges seemed feasible because members of the judiciary in Mexico are frequently involved in academic activities, participate in lectures and seminars or teach at universities. In this context, judges are not required to gain permission from an administrative body (the Federal Judiciary Council) to give a lecture or participate in an academic project such as this one. I negotiated access to judges in the LM state while still in the stage of planning the thesis (in London). I also gained access through a snowballing strategy which involved building the sample through referrals from previous interviewees (O’Leary, 2010).

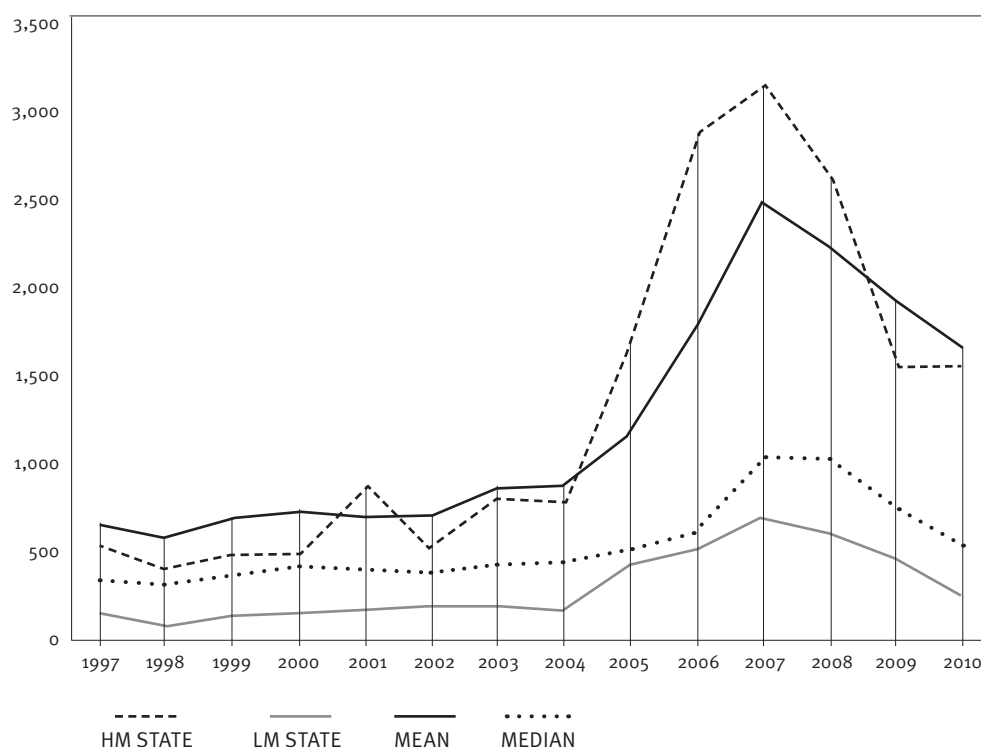
### *State selection and comparability*

Mexico is a large and diverse country, politically divided into 32 states (including the federal district where Mexico City is located). The selection of the states needed to fulfil two different goals: on the one hand, to compare a state that experienced the army’s sudden involvement with one that did not; on the other,

to find two states that were not too different in regards to their crime rates.

Drug trafficking organisations distribute different drugs through specific regions of the country and operate in delimited areas. Table 6.2 shows that the HM state experienced changing patterns of reported drug offences after 2004, but before then its offending rates laid below the mean. It also shows that the LM state's rates have remained low, in contrast to both the national mean and the HM state, and that the LM state has been consistently similar to the majority of states, in other words, closer to the median.

Table 6.2 Drug-related offences 1997-2010



*Source:* Data obtained from the Executive Secretary of the National System of Public Safety in “Criminal rates concerning federal jurisdiction 1997 – 2012”, consulted on 20<sup>th</sup> March 2012.

Despite the differences between the selected states, it is important to highlight that the great majority of drug-related offences were concentrated in a small number of states. For instance, in 2010, over 70 percent of reported drugs offences took place in only four out of 31 states and the federal district (not including any of the examined states). The LM state concentrated 1 percent and the HM state, 3 percent of the total reported drug offences nationwide.

Similar to drug offences, general crime rates vary widely across the country, and despite abrupt increases in specific violent offences in the HM state, the selected states were not too distinct in regard to their general offending rates. By 2012, 50 percent of reported crime took place in only 6 out of 31 states. The LM state's reported crime represented 5 percent of reported crime nationwide, and the HM state represented 3 percent (INEGI, 2014). In sum, the LM and the HM states do not have much variation in offending rates, by comparison to the way in which crime rates concentrate in a few areas of the country. However, eruptions of drug violence in the HM state fostered abysmal differences in each state's context.

### *Highly militarised state*

As described in the first chapter, after 2005 a sharp increase in violent crime affected the whole country, in particular, those regions where drug-trafficking organisations struggled for control and the army intervened. This includes the HM state where many judges and other criminal justice practitioners were interviewed.

Since the late 1990s, the HM state faced a security crisis, allegedly due to the lack of agreement between drug-trafficking organisations concerning which organisation should control the state and the arrests of key leaders of these organisations (Astorga, 2007; Conger, 2014). Violence was sparked by the arrest of a member of a powerful drug-trafficking organisation and the subsequent bloody territorial struggle between cartels (Astorga, 2007; Conger, 2014).<sup>109</sup> This led to several changes. First, it became obvious that drug traffickers lived in the state; second, the way in which executions linked to drug gangs were carried out changed. These executions had traditionally been performed in rural areas but began to take place in urban zones. Also, bodies used to be dumped in the middle of the night in deserted places, but began appearing in daylight and in public spaces such as in front of a school or hanging from a pedestrian bridge.<sup>110</sup> In sum, the type of offences and the way in which these occurred revealed that ordinary violence had evolved to drug violence (Shirk & Wallman, 2015). The cycle of experiencing a wave of violence preceded by the arrest of an important member of a drug-trafficking group was repeated several times during the first decade of the 21<sup>st</sup> century.

These manifestations of violence, together with a rise in violent offences such as homicides, aggravated theft and extortion, proved that a war between drug

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<sup>109</sup> Interview with academic.

<sup>110</sup> Interview with academic.



trafficking organisations was taking place in the state. For example, between 2009 and 2011, homicides rates increased 700 percent; in 2009, 7.4 deaths were reported and by 2011, homicides grew to 44.8 (México Evalúa, 2016). The executed victims included allegedly members of criminal groups, attorneys, public servants, police officers, as well as other citizens.

The increase in serious offences was significant. For instance, homicides related to organised crime increased above 300 percent from 2007 to 2010 (CIDAC, 2012). Reports of kidnapping increased exponentially, above 1,600 percent, as well reports of vehicle theft, above 2,300 percent and of extortion, above 30 percent (CIDAC, 2012). The obvious consequence of rising crime was an increase in the daily workload of criminal justice institutions. Whereas petty theft and white-collar crime, such as money laundering and smuggling goods, were typical offences until the early 2000s, violent homicides (executions), kidnappings, disappearances and extortions, together with serious drug trafficking and organised crime offences became the main focus.<sup>111</sup>

The type of offenders changed as criminal groups involved in drug trafficking began recruiting younger people, including children.<sup>112</sup> This was a national phenomenon, and at least 25,000 teenagers and young adults (up to the age of 25) were recruited by drug-trafficking criminal organisations from 2006 to 2010, according to the Congressional Public Safety Commission (Martínez, 2012). A potential interviewee from the high militarisation state commented that children and women were recruited by criminal groups because the young men had already been killed.<sup>113</sup>

In response, civil society carried out many protests demanding that the state government increase safety measures (Ley, 2014). In addition, many companies and business owners left the state or put their investments on hold (Reuters, 2011). By 2006, a once prosperous state was crumbling to pieces. According to the Bureau of Alcohol, Tobacco, Firearms and Explosives, the capital city had become a strategic place of the country for drug trafficking (Reuters, 2011). However, local politicians barely acknowledged that the state was an important location from which to coordinate drug trafficking operations or that aid was desperately needed (Astorga, 2007).

This violent environment was visible across the capital city and spread to other parts of the state. It also became evident that criminal groups were now using high-calibre firearms. For example, in a local bar several hitmen riddled

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<sup>111</sup> HM magistrate 1; HM academic interviewee; HM NGO member 2.

<sup>112</sup> Informal conversation with potential interviewee from a first instance court.

<sup>113</sup> Informal conversation with potential interviewee from a first instance court.

four men with bullets and let off two grenades, killing those four men and injuring 20 other people (Astorga, 2007).

The military became involved in 2006 and in 2009, enhanced assistance was received (Mendoza Márquez & Montero Bagatella, 2015). The army patrolled the streets, established checkpoints across the state and became embroiled in confrontations with drug-trafficking gangs. In particular, the army began to intervene in specific neighbourhoods of the capital city where allegedly the Zetas, a bloody and highly armed drug trafficking organisation, had settled in. Not even the police dared to enter these neighbourhoods. In response to the army's intervention, members of a specific neighbourhood blocked main roads to protest publicly that the army was committing human rights violations. However, it became common knowledge that the protestors were on the 'side' of the Zetas and sought to show explicit resistance to the army (El Economista, 2009).<sup>114</sup> Members of the Zetas became widely known as *malitos* (baddies). This term became popularly used by local newspapers and by the general public, as it allowed them to refer to members of the Zetas without directly naming them.<sup>115</sup> Blocking roads with people, burned-out vehicles or cargo lorries became a common practice of this drug trafficking organisation. For instance, after an important leader was arrested in 2010, 42 highways and roads were blocked across the capital city. The head of the State Public Security Secretariat declared that these roadblocks (referred to as *narco-bloqueos*) seemed intended to create a confrontation between civil society and the authorities (El Informador, 2010).

The presence and active participation of the military was due, according to most interviewees, to the fact that the HM state was left essentially with no municipal and state police force because either police officers were detained for corruption or killed. Since the end of 2006, many police officers have been shot, including senior officials, and many others resigned (Astorga, 2007). Though there is no systematised database concerning police officers' deaths, in 2010, for instance, there were 87 cases of police officers' homicides, and by September 2011, 94 police officers' killings were registered. The polarisation of opinion concerning the military's involvement that is visible in polls was also mirrored in interviews held with judges (Beltrán & Cruz, 2011). Military convoys were seen across the city all day long. Some judges expressed approval of the mili-

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<sup>114</sup> Interview with HM academic.

<sup>115</sup> I held many informal conversations with locals such as taxi drivers or cleaning assistants who were willing to talk about this with me.

tary's participation in "providing safety"<sup>116</sup>, while others disagreed with the "military's distorted duties".<sup>117</sup>

The lack of safety was easily sensed across the city and confirmed by its residents, including criminal justice practitioners. The police were completely unreliable and replaced by soldiers who were heavily armed and often involved in gunfights with drug gangs and other criminal groups. The capital city of the HM state was essentially in a state of war, where inspections and checkpoints were operated by the army and informal curfews made nightlife vanish. People's ordinary routines adapted to the daily violence to the extent of adjusting schedules, traffic routes and family dynamics.

Court buildings were guarded by the military and the criminal justice practitioners' workload shifted from mainly financial and tax offences to large-scale drug trafficking, firearm possession and other offences relating to organised crime. Reports of abuses and human rights violations committed by all law enforcement agents also increased. Public officials' statements encouraged and justified waging war against these enemies in the light of increased risk and unsafety.<sup>118</sup>

Conducting fieldwork gave me an opportunity to feel the stress myself. The minute one arrived at the low-tier courts in the HM state (all located in one large building), one entered a military environment. Military convoys were usually parked outside and the building's entrance was guarded by soldiers with high calibre weapons in hand. The defendants who appear in these courts, in contrast to the LM state and other parts of the country, are linked to organised crime offences including violent homicides and unlawful storage of firearms, and remanded in high security prisons. Private lawyers began rejecting these cases when their colleagues began to disappear or be found killed, so they now form the bulk of public defenders' workloads.<sup>119</sup> Although there is no sufficiently systematised evidence to corroborate this claim, many press releases describe the violent death of attorneys whose clients allegedly belonged to criminal groups and drug trafficking organisations.<sup>120</sup>

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<sup>116</sup> HM magistrate 4.

<sup>117</sup> HM appeals court magistrate.

<sup>118</sup> The head of Public Security State Secretariat, explained in an interview that the enemy of the state, given the presence of several drug trafficking organisations was everyone who threatens society's safety and its integrity.

<sup>119</sup> Informal conversation held with a public defence attorney's secretary, 2013.

<sup>120</sup> One widely-covered execution was of a barrister known as the "narco attorney" (*la abogada de los narcos*), killed in the centre of the capital in August 2009 after surviving four homicide attempts (El Informador, 2014; El Siglo de Torreón, 2014). This attorney was

### *Less militarised state*

By comparison, several states, including the LM one, remained largely unaffected by the wave of violence. One possible explanation is that this state is not on drug trafficking routes, so large quantities of drugs are not transported through this state. However, several leaders of major drug trafficking organisations were detained by the army in luxurious residential developments in this state's capital city. Press releases confirm that the state government tends to look the other way so that drug leaders' families can live quietly and safely.

Drug offences in the LM state increased but not significantly. Rates remained below the national average and behaved similar to the median, namely, the majority of states. The highest point, which was reached in 2007, amounted to barely one fifth of the highest number reached in the HM state. Relevant offences, such as homicide, kidnapping, extortion, violent theft and car theft, started increasing from 2005 onwards but also stayed below the national average. In contrast to other parts of the country, such as the HM state, the army hardly operated in the LM state. Streets were patrolled by state police officers and crime investigations were conducted by the civil police force. The military intervened and participated only exceptionally.

In sum, the comparison between a relatively safe state –the LM state- and an affected state by drug violence –HM state-, together with the possibility of accessing members of the federal judiciary and other members of society in the states, made it feasible to pursue a comparative case study of the federal judiciary.

### *Drawing the boundaries of the research*

This research focuses on the federal judiciary, setting aside state judiciaries and state politics. Different type of reasons explain this selection.

FIRST, I sought to examine a set of judges who have a certain level of independence from the executive and legislative branches of power. The federal judiciary has relatively greater independence than state judiciaries. State judiciaries' independence is strongly compromised by regional politics (Ovalle Favela, 1999). For instance, the state governor is entrusted with appointing state justices which paves the way to affecting judicial performance, in particular, in cases where law-enforcement agents act unlawfully or where state policies contravene constitutional provisions (Concha, Magaloni, & Schatz, 2007, p.204). SECOND, I chose the federal judiciary over state ones due to the strength federal

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shopping in a local market with her daughter when she was shot to death by at least three people, just a few blocks from the federal police headquarters and first instance courts building.

rulings have. State justices' decisions do not establish precedent. As a result, state rulings are not regarded as authoritative and, in general terms, do not guide judicial decision making and judicial behaviour as federal rulings. **THIRD**, this research aims to examine the way in which a highly militarised and violent context informs judicial decision-making and judicial behaviour. I sought to do this through the comparison of two sets of judges where the main variant was their specific context. By comparison, examining state judiciaries would involve a wider set of variables, many linked to state politics and local idiosyncrasies, which would hinder deeper understanding of the main enquiry. **FOURTH**, to examine federal judges as opposed to state ones offered wider access possibilities. Negotiating access was much more feasible with federal officials because, on the one hand, transparency laws are more effectively enforced at the federal level than at the local level, so examining public versions of judgements was possible. On the other hand, because of my past professional experience I had more chances to accessing federal judges than state ones, even though they were located in different parts of the country.

One pitfall of this choice was that the vast majority of registered offences, more than 93 percent, are state offences, while federal offences represent only 7 percent (INEGI, 2013). In addition, state offences include serious offences such as kidnapping, homicide or extortion, as well as common ones such as theft or battery. Therefore, to learn whether judges see the vast majority of offenders, including murderers or kidnappers, as enemies of society is beyond the scope of this research. By comparison, the offences that are the main interest of this research concern drugs, because they represent the most common offence at the federal level and have a direct linkage to law enforcement efforts to the president's war on organised crime.

Another boundary concerned the time frame. This project examines judicial behaviour and judicial decision making during the immediate past President's administration, from 2006 to 2012. This was pursued for several reasons: **FIRST**, I was mainly interested in the current context. **SECOND**, judgements are more easily accessed if they were recently issued because digital versions are a relative novelty and also because judicial guidelines call for the destruction of case files a few years after the judgement was issued and became *res judicata*. **THIRD**, interviewing judges who have retired or changed professions, as opposed to those currently in post, would provide a different picture to what is currently experienced in court. In sum, conducting comparative research was much more feasible when contrasting two different locations during the same time frame.

A final boundary was that the comparison focused on the variant of geographical location, discarding inherent differences that concerned gender, age,

rank or any other. Gender was discarded from the outset in light of the imbalance of women against men within the judiciary. Age was not recorded and so only rank was used to find further comparisons. From this exercise no trend could be traced to produce significant observations.<sup>121</sup> In addition, the comparison was methodologically weak because the number of trial or first instance judges in the LM state is significantly larger than that in the HM state which produced weak comparisons.

Successes and complications during fieldwork naturally created additional boundaries, particularly concerning effective access, all of which are explained in the next section.

## Data collection: experiences in the field

The two main sources of information that I used were semi-structured interviews and trial court judgements. An underlying aim pursued was to step into judges' shoes and learn as much as I could from their own perspective about judicial decision making. In pursuing this aim I learnt to build rapport and confidence with the interviewees. Also, I encountered different experiences. At times, I felt genuine empathy towards judges and the views they shared. For instance, several judges seemed to express frustration about the prosecution service who failed to indict dangerous or high profile offenders, "people say that our state is very calm and safe but everybody knows that our state is Zetas' territory, that highways are used at night as heliports and that the leader is located just behind the military base, how can anyone make sense of that?"<sup>122</sup> Frustration also was expressed against legislation that left judges a low margin of discretion to decide, for instance, upon custodial remand which is compulsory for most offences or being unable to impose a sentence below the minimum length established in the sentencing tariff.

At other times, I felt fear. For instance, when planning my way to the courts in the HM state, a few people told me "you don't want to walk back from the courts on that road because many kidnappings have taken place there" or "that

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<sup>121</sup> For example, interviewees from all ranks agreed that defendants are not evil but rather ordinary people. Only a high ranking interviewee from the high militarisation state held that there are malicious defendants which also matched a first instance judge and a high rank judge from the low militarisation state. Conceiving defendants as victims of the criminal justice system was mentioned by both first instance and high rank interviewees from the HM state.

<sup>122</sup> Interview with Magistrate 1 in a different state.

morning a grenade was found outside the courts building”<sup>123</sup>. Feeling fearful made me think about the difficulty of trying high profile offenders, while remaining impartial and objective. One judge told me about a case where he found a man guilty of possession with a firearm without a licence. This is classified as a non-serious offence so the sentencing tariff is low so most of the sentence is served on parole. The convicted man appeared before the court every Monday to sign the parole registry, complying with the parole conditions. Nonetheless, the judge found it difficult to impose him the sentence based on the sentencing tariff because the firearm was coated with diamonds saying ‘*Cártel del Golfo*’.

Carrying out fieldwork was in itself an enriching and challenging experience which, I hope, gave voice to the many views, opinions and experiences interviewees shared with me. My overall sense was that judges were prone to describe their views, perhaps because the interview represented a chance for them to express themselves on an individual basis while taking a bit of distance from the institutional discourse.

### *Plans for carrying out semi-structured interviews*

Interviews are considered to be main source of information for qualitative methodologies (Mason, 2002; Perakyla & Ruusuvuori, 2011; Silverman, 2010). Research using qualitative methodology allows an examination of interviewees’ own perspectives in depth, experiences and concerns, which would otherwise remain inaccessible (Perakyla & Ruusuvuori, 2011). Semi-structured interviews were used in this project because they follow an interviewing schedule, which is closely linked to the research questions, but allows rich and detailed data to be gathered while minimising control or bias (Mason, 2002).

For the purpose of the present research, the use of semi-structured interviews was preferred because the research questions could be better answered through what respondents, primarily judges, described to be their way of understanding and thinking about defendants or the main sentencing goals pursued when imposing a sentence, for instance. Throughout fieldwork, I relied on an interview schedule which was a helpful strategy to spark the conversation.<sup>124</sup> Stepping out of it also brought many interesting accounts which were only made possible through using a flexible semi-structured design.

Interview methods also involve systematic observation of the interviewee’s demeanour, non-verbal behaviour and use of space, among other factors (Ma-

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<sup>123</sup> Interview with public attorney, HM state.

<sup>124</sup> The interview schedule is contained in Appendix 1, together with the ethics form and information sheet approved by King’s College Ethics Committee, all of which is explained below.



son, 2002). As interviews were most likely held in court premises, informal observation was also used and was recorded in the form of field notes. In addition to interviewing members of the judiciary, I also sought the views of other relevant practitioners, including defence attorneys, members of non-governmental organisations and academics. Before travelling to Mexico and beginning fieldwork King's College Ethics Committee granted me approval to conduct empirical research as it involved human participants. This is described in the Ethics section below.

### *Experiences while conducting interviews*

The fieldwork as initially planned was fulfilled to a large extent. By the end of the fieldwork, I managed to conduct 56 interviews. I interviewed 28 members of the judiciary –including a former court clerk-, 20 defence attorneys, one former Attorney General, three NGO members, a member of the state police, and three academics. Most interviews were concentrated in the LM and HM states, but I also conducted interviews with judges and experts on criminal justice reform in Mexico City, Hidalgo and Morelos, partially as a result of the snowballing strategy.

I conducted fieldwork from September 2012 to July 2013. During this period I travelled to the LM state more than ten times as it involved a two-hour drive; some of these trips only entailed negotiating access and scheduling an interview. In comparison, to get to the HM state I had to take a one-hour flight which meant additional costs, so I travelled there on fewer occasions.

There are 19 federal judges in the LM state. Of these, 14 agreed to be interviewed: eight first instance or trial judges (8 out of 11), two appeals magistrates (2 out of 2) and four constitutional magistrates (4 out of 6). The sample contained 73 percent of the population. In addition, I interviewed an auxiliary magistrate and 11 public defence attorneys. By comparison, there are 14 federal judges in the HM state. At the end, eight of them agreed to be interviewed: two first instance judges (2 out of 6), one appeals magistrate (1 out of 2) and five constitutional magistrates (5 out of 6). The sample represented 57 percent of the available judges. In addition, I interviewed two NGO members, an academic, seven public defence attorneys and one private attorney.

Most of the interviews were recorded using a Dictaphone, though a few were only documented through hand-written notes. I personally transcribed all the interviews, as was promised to all interviewees so that I was the only person who accessed the interviewing material in order to guarantee complete confidentiality. At times the interviewee asked to have a transcript of the interview, so this was delivered several days later; only one judge, one defence attorney

and one NGO member asked to edit the interview transcript and the edited versions were the ones analysed in this thesis.

For the initial interviews, gatekeepers played an essential role in both locations. After their referrals were exhausted, I negotiated access myself. The strategy was to visit all judges and ask for a quick three-minute meeting in order to invite them to participate in this project. This involved giving a short description of the project, the methodology used and confidentiality and anonymity guarantees. At the same time, I provided a detailed information sheet, previously approved by King's College, explaining the aims and motivations of the research, the financial institution supporting the research and the main themes of the interview, together with the interview schedule. During these informal meetings I held interesting conversations with most of them, despite the fact that not all of them agreed to be interviewed. Only on a few occasions the judge did not grant me the meeting but rather asked somebody else to meet with me.

Sometimes a judge would immediately agree to be interviewed during the meeting; an appointment was then scheduled. Other judges needed time to think and asked me to contact them several days or weeks later. This meant I had to wait on the phone or outside their chambers, but waiting did not guarantee an interview. Occasionally potential interviewees asked for my résumé, birth certificate, and professional credentials such as a copy of my law degree certificate or master's degree certificate.

Accessing judges in the HM state was generally easier than in the LM one, but accessing low-tier judges in the HM state became more complicated towards the end of the fieldwork. The only low-tier judge I interviewed told me that in a meeting all judges present had talked about my research and about me personally. Apparently, they expressed fear of having their names printed in the final draft and were also irritated about being examined through the written judgments I had requested several months before. The interviewed judge said he disagreed, together with one other judge (the other one agreed to have an interview), but the other four openly expressed their decision not to participate in the project. I could even sense a change of attitude from two judges who at the beginning expressed interest in participating.

Reflecting on their change of attitude, I concluded that the fact that they were aware of the judgement analysis made them feel observed and held accountable by someone outside the judiciary. Access to interviews is easier to deny than access to written judgments for judges are legally bound to permit access to judgements because they are public documents.

### *Gathering archival material*

Archival materials consist mainly of official documents, such as crime statistics, case files and historical records and non-governmental organisations' records, as well as diaries and mass media (Bryman, 2008). Using documents may be useful in projects which include interviews to verify or contextualise personal accounts (Mason, 2002; Perakyla & Ruusuvuori, 2011).

Mexican court judgements are traditionally lengthy because they contain a description of the main trial proceedings and all arguments made by the court that led to the verdict. Trial proceedings generally include a summary or full transcripts of witness and defendant statements as well as expert testimony, such as the chemical analysis of confiscated drugs in drug related cases. Judgements also contain the way in which each piece of evidence previously described was considered by the judge and whether it was used to support the final verdict or was discarded. As sentences are decided by the trial judge, judgements also include the court's explanation for imposing a particularly severe or lenient punishment. These arguments are accompanied by the legal rules that sustain the judge's decision, derived from both legislation and precedents; this material tends to be transcribed or at least referenced in detail.

The fact that judgements contain such detail allowed in depth qualitative analysis. In particular, it was possible to look for any trace of enemy penology, either in a reduction of particular procedural rights, the way in which evidence had been assessed and used, or harshness in sentencing. This analysis also helped understand what conditions led to applying an enemy penology paradigm. In sum, examining judicial decisions was essential in order to answer the research questions. At the same time, judgements were hardly useful to examine judicial behaviour and judicial roles, conversely to interviewing material.

Only first instance or trial court judgements were examined, so appeals decisions or those made by constitutional tribunals were not included in the analysis. The methodological reason for this was that this project sought to investigate the effect of a particular policy in trial courts, where there is less room to manoeuvre than in higher courts. Also, first instance courts have direct contact with defendants as well as witnesses and experts so, as I looked for enemy treatment in resolutions, I aimed at learning about judges' experiences when meeting defendants face to face, as opposed to deciding an appeal based mainly on the paper submission. Additionally, not every convicted defendant appeals the court's decision, so the scope of cases was more limited.

Judges are bound by transparency laws that allow any regular petitioner to consult issued judgements. Gathering 40 judgements from two states solely on drug-related offences was not straightforward for two main reasons: **FIRST**,

judgements are traced by the number of case file in which they were issued, so the number of the case file is essential to access a single judgement. SECOND, case file numbers are allocated by each court as the case is submitted before the court, so the numbers are not assigned on the basis of the type of offence. So, to access 40 judgements from two states, concerning specific type of offences implied taking several steps.

The first step was to learn the total number of cases initiated in one year, from 2006 to 2012, in every first instance court in the two examined states. The second step was to make a random selection of cases, using a simple tool in Excel which gave a selection of 63 case files from the LM state and 66 case files from the HM state, so I formally requested the final judgements issued in those 129 case files. Not all of the judgements were sent to me but from those that I received I then discarded judgements that dealt with offences unrelated to drugs. The final sample comprised 40 judgements.

The sample of judgements is small, which limits the generalisability of the analysis and findings. Forty judgements were analysed in detail from both the LM and HM state, but the sample was far from representative. For instance, in 2010 in the LM state, 852 criminal cases were opened, covering all types of offences. From this universe, 12 were randomly selected and requested; out of this sample, only three concerned drug offences and were thus examined. Similarly, in the same year, 1,190 cases were initiated in the HM state, from which 16 were solicited and following the same rationale, only three were analysed.

The sample of judgements thus became more limited as it grew more specific. It is noteworthy that there are no systematic statistics within the judiciary on the total number of cases per type of offence. Therefore, the examined judgements were gathered by soliciting a wider number of cases, knowing that only a small minority would match the criteria. The sample was limited, but the selection was genuinely random which sought to guarantee its validity. Also, validity was enhanced by the fact that the judgements I examined were issued by all courts in the HM state and eight out of 11 courts in the LM state. This meant that the examined judgements were issued by a variety of courts, which strengthen the claims made here.

## Data analysis

The analysis of official texts may be approached with a different set of methods, which include content analysis, discourse analysis and membership categorisation analysis. The first involves thematic analysis and quantification of recurrent words and concepts (O'Leary, 2010). The second focuses on the way

in which texts of different kinds reproduce power and inequalities in society (Perakyla & Ruusuvuori, 2011). Discourse analysis assumes that language constitutes a socio-historic context strongly related to power and knowledge (O'Leary, 2010). The third relates to analysing the ways in which particular categories, built on descriptions of concepts and the actions related to these concepts, are used and interpreted. The adoption and use of specific categories in social situations as well as in texts—the mere naming of a member as belonging to a certain category— simultaneously attributes to these social situations specific moral qualities, obligations and refutations (Perakyla & Ruusuvuori, 2011). This project relied mostly on a thematic analysis.

Initially, data analysis of judgements and interviews followed the same logic of coding themes relevant to enemy penology; categories were informed by contents of judgements and interviews, and also by relevant literature. Throughout the analysis stage, new coding themes were created and the initial ones were constantly developed, enriched by literature and other theories (O'Leary, 2010). The theoretical framework of enemy penology initially guided the data analysis process in order to ascertain whether the judiciary had endorsed the enemy penology paradigm in deciding cases. This analysis strategy refers to what Yin calls the strategy of relying on theoretical propositions because elements of enemy penology informed the way in which data was both collected and analysed (2009, p.130). Hence, interview and case file analyses focused on the following issues:

- Ways in which the defendant is conceived (e.g. as an ordinary person, as an enemy, as a victim of circumstance, etc.).
- Effective or ineffectiveness of due process principles, in particular concerning presumption of innocence.
- Possible effects or changes of trial proceedings in cases where the military participated.
- Sentencing values and aims pursued by the judiciary, such as rehabilitation, selective incapacitation, retribution, elimination.
- The severity of punishment.
- Possible effects or influence on the judiciary stemming from the president's war on organised crime.

After conducting the analysis based on enemy penology, I examined the interview data with reference to the theoretical framework concerning judicial behaviour and judicial roles in order to further the understanding on the judges' accounts.

### *Interview analysis*

Interview analysis involved transcribing all the material gathered from interviews held only with judges. The interviews I conducted with other actors, except in specific circumstances,<sup>125</sup> were used as a secondary source so were not transcribed. Once I had the transcripts I systematically categorised the material under themes, sub-themes and sub-sub-themes. The main thread of these themes was enemy penology, but these threads developed and grew as the content touched on opinions about other themes such as the military's performance in crime control activities or views on the prison system. The coding tree also developed as I began drawing on additional theories that concern judicial behaviour, judicial roles, denial theory and cognitive dissonance.

The coding tree evolved as a single theme developed into further ramifications. For instance, due process was a theme that clearly derived from the model used, and presumption of innocence was used as yardstick. As interviewees explained their views on effective or ineffective presumption of innocence, many of them touched on the prosecution's performance, and in this sub-theme, interviewees described practices in proceedings and also tendencies towards corruption. As a result, from one theme (due process or presumption of innocence), I developed the sub-theme of the prosecution and also sub-sub-themes on practices and performance. The coding frame grew in number of themes and also in the ramifications of each theme.<sup>126</sup>

Findings were presented in one report per state and a final section discussing similarities and differences. A follow-up analysis was made in order to present the discussion on the findings from both states in one chapter. This aimed at presenting similar voices together and also at facilitating comparisons between the two states. A secondary analysis of interviews relied heavily on theories on judicial behaviour and judicial decision-making, as well as on denial theory and cognitive dissonance theory which are discussed in those chapters.

Throughout the analysis, I found that judges and also other interviewees used different tones during the interviews which needed to be discussed in order to fully grasp what interviewees expressed. Another methodological theme concerned the fact that the vast majority of judges, despite being located in a

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<sup>125</sup> One defence attorney agreed to be interviewed as long as he could read the transcript. This became a high priority because he had previous experience in the high militarisation state and kindly introduced me to his colleagues there. I also transcribed several interviews held with another defence attorney and with a NGO member, because they agreed to have the interview with no tape recorder, so to transcribe them soon after the interviews was the only strategy that would not omit any relevant information.

<sup>126</sup> Appendix 2 contains a detailed account of the coding tree.

particular state had worked in several other locations so several implications unfolded from this. FIRST, their views and commentaries were enriched and informed by many professional experiences held in different locations. As one magistrate, he had worked in places where drugs are grown and others where these are distributed. SECOND, some judges seemed comfortable to speak about previous experiences. THIRD, the comparison between locations became blurred by the fact that the interviewees' accounts were informed by experiences held in various places that may not have direct linkages to the LM and HM states' environments.

### *Differences of tone and meaning*

Commentaries and opinions expressed by judges during the interviews were phrased in different ways. At times they talked in terms of what ought to be with expressions like "we should be..." thinking about what ought to happen or what was expected. At others, they explained their views in terms of what actually took place, such as, "we safeguard due process" or discussed what sources of pressure might push the judge to rule against defendants on a regular basis. These two types of speech were clearly present in the commentaries and views expressed. However, the study also found that, at times, interviewees were rather indirect or cautious in the way they approached particular topics. In other words, a difference in tone, understood as general character of attitude revealed in the way they spoke, marked the difference between what was described to be happening as opposed to what ought to happen. These variations in tone and form of speech were present in all interviews, and judges constantly switched from one to another. This suggests that the views expressed do much more than simply state factual information. Their opinions are a combination of facts, ideas, perceptions and sentiments grounded in their personal and professional experience.

To separate positive or descriptive opinions from normative ones is a difficult task, particularly for those who hold the opinion in question. As Posner states,

Positive and normative analysis cannot easily be separated when one is dealing with people's deliberate actions, for unless they are evil or cynical people, the best explanation for their actions is unlikely to be that they are deliberately flouting the norms of their society (2008, p. 6).

At the same time, judges' opinions may be understood as rationalisations in the form of justifications or excuses, drawing on denial theory, which defines these opinions as accounts.<sup>127</sup> Accordingly, accounts are learnt by ordinary

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<sup>127</sup> Justifications are accounts in which one accepts responsibility for the act in question but



cultural transmission and adopted within a group due to their public acceptability (Cohen, 2012, p. 58-59). This is not to say that judges expressed genuine guilt or shame; rather, certain responses appeared to reveal some sort of denial, either of the consequences of judicial decision-making, of the restrictive legal scope to which they are tied, or the complicated environment in which they are immersed.

At the same time, expressing opinions in terms of what ought to be touches upon the fact that judges are expected to act according to socially accepted values, such as impartiality, objectivity, fairness and prudence. Judges are expected to live up to the highest standards, to “decide a case solely studying the file, isolated from everything else”.<sup>128</sup> However, in the words of a magistrate, “Judges are human beings like you, like me”.<sup>129</sup> Hence, judges are constantly attempting to achieve and honour these values and standards to the extent that their views mirror a normative ethos.

Most accounts portrayed court proceedings and judicial decision-making as being unaffected by the environment, largely based on an ideal judge who is fully committed to impartiality, unbiased, insulated from outside events and considering only what is documented in the case file. Some of the interviewees revealed subtly the tension of keeping themselves and their work unaffected by context, while taking note of the conflictive environment where the military participated in crime investigation and where false positives occurred. At times, this tension appeared to be almost non-existent.

I cannot claim to have discovered the underlying meaning in judges’ comments. Instead, I have sought to portray the comments as literally and precisely as they were stated in the interviews. At certain points I have attempted to make a judgement about whether the interviewee is telling me about what he or she thinks should happen or what does happen, but this distinction was not always clear to me. I hope, however, that this approach will demonstrate that these accounts are not isolated or serendipitous but are confirmed by relevant literature on the subject. My overall goal is to use both primary and secondary data to develop a deeper understanding of the judiciary and of judicial decision-making in contemporary Mexico.

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denies the negative quality associated with it. In contrast, excuses are accounts in which one admits that the act in question is wrong or inappropriate but denies full responsibility (Cohen, 2012, p.59).

<sup>128</sup> Interview with expert on criminal justice issues in Mexico.

<sup>129</sup> HM magistrate 5.

### *Carrying prior judicial experiences*

Judges' views are shaped by their daily workload. For example, judges from the LM state dealt with hardly any cases in which the military participated, and the amounts of money or drugs involved were significantly lower than those in the HM state. Judges are also influenced by past experiences in different regions of the country where they carried out judicial work. For example, several interviewees from the LM state made references to prior experiences where they had to deal with large-scale drug trafficking and military involvement in crime control.

As a result of judges' different experiences, the views expressed did not necessarily only reflect their current situation but rather expressed a blend of different professional experiences. Methodologically, this blend complicated the comparison, which sought to contrast judicial experiences from two different sites without taking into account how previous experiences gained in other locations informed their answers. However, the blend made the analysis far more interesting. For instance, it appeared that judges in the LM state who had previously worked in an unstable or dangerous environment would more openly express opinions about trying dangerous offenders and working in dangerous contexts than those interviewed in the HM state. Also, it appeared that judicial decision-making may be strongly informed by experiences gained in particular locations, to the extent of carrying legal reasonings to other environments.

### *Local or federal judges?*

The research is framed and focused only on the federal judiciary and federal legislation. However, the attempt to isolate the subject of study from other actors and factors, such as state politics, state judges and state laws, was difficult to fully accomplish, for several reasons. Federal judges not only try federal offences but can also examine state judgments via the constitutional protection proceedings as explained in Chapter 4.<sup>130</sup> For example, constitutional magistrates hear both federal and state cases and examine federal and state authorities' decisions. Methodologically, then, it is important to bear in mind that views and comments may be informed by the experience of hearing not only federal cases and dealing with fellow federal judges but also by contact with local entities and individuals.

Second, both federal and state judges live and work within the same geographical location. This enables interaction with fellow judges and also with other professionals. For example, during an informal meeting, an interviewee

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<sup>130</sup> Organic Law of the Federal Judiciary.

mentioned having talked with those in charge of the local prison system, where federal prisoners served their sentence, about daily practices within the prison.<sup>131</sup>

### *Judgement analysis*

The analysis of judicial decision-making using court judgement was also carried out in several stages. Initially, I developed a detailed spreadsheet in which all data from the judgments could be organised. This sheet was used to record information from the 40 different judgements, which ranged from general data such as number, date of events and date of verdict to type of arguments used by the court to verify intent to supply.<sup>132</sup> Having categorised the contents, I presented the results in the form of reports per state and a final section where comparisons and contrasts were discussed. A secondary stage of analysis involved another writing up of the findings, aiming to discard detailed information from the judgements I deemed irrelevant and highlight certain patterns and tendencies.

### *Interviews and cases in tandem*

I answered the research question using mainly judgements and interviews, which together provide a better understanding of the judiciary. On the one hand, judgements encompassed the actual judicial performance, while on the other, interviews accounted for different motivations that explained judicial performance outside the judgement or even outside the case.

To rely only on judgements would have provided only an institutional description of judicial activities, leading to a rather superficial understanding. Similarly, to base observations and findings solely on interviews would present a very different picture from what was found through the analysis of judgements, as will be discussed in the corresponding chapters. Using judgements and interviews in tandem helped to answer questions about how judges hear cases and what may explain the way in which cases are tried. Gathering voices from the judiciary, through interviews and through case file analysis, allowed me to corroborate observations and to raise further questions.

Moreover, once the data from both judgements and interviews was analysed, the secondary analysis and discussion of findings from judgements and interviews separately but also in tandem, was enriched by drawing on judicial roles and theories on judicial behaviour. In this regard, theories on judicial behaviour

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<sup>131</sup> LM appeals magistrate 1.

<sup>132</sup> Appendix 3 contains a detailed account of the different spreadsheet categories and what type of contents were included.

and on judicial roles were not used to collect the data or guide the analysis of the empirical data. Instead, once initial findings were pinned down, these theories helped to answer further questions and gather deeper understanding of judges' individual accounts and also of the Mexican judiciary as a whole.

### *Triangulation*

Triangulation, examining where data drawn from different methods intersect, is a way of ensuring valid findings (Bryman, 2008). However, overlaying information derived from different perspectives and obtained by different methods has been held to be problematic (Silverman, 2010). Triangulation will be used cautiously, focused on adding breadth and depth to the study (Ritchie, 2010).

## Language

The research required me to draw on Spanish (my mother tongue) and English (my second language). Both languages were used to prepare the theoretical chapters as I used bibliography from many countries published in English or Spanish. In particular, I consulted Günter Jakobs' work in Spanish which has been published in several countries across Latin America. Also, many scholars who have commented on Jakob's enemy penology model have published their work in Spanish in Latin America and Spain. Similarly, I drew on bibliography published in English which also discussed enemy penology, as well as many other themes which helped me build the theoretical framework. In particular, I relied heavily on American bibliography to examine theories on judicial behaviour and judicial decision making. I consulted different sources published in both English and Spanish about Latin American criminal justice systems and also about the Mexican one.

In regards to the empirical chapters, the data that I collected was in Spanish –interview material and judgements– therefore the material was coded in Spanish, using both Nvivo and Excel spread sheets. I drafted findings reports which evolved into the empirical chapters of the research in English. This meant that I was fully in charge of translating all of the material that is presented in these chapters, including direct quotations from judgements, public statements and interviews. Also, legislation and rulings –both binding and persuasive ones– were translated during the course of the research by myself.

To translate certain concepts such as insecurity or impunity ask the reader to bear in mind that the Mexican and perhaps Latin American context have given these concepts particular meanings. For instance, Birkbeck noted (2013, p. 20) that insecurity is a term widely used in Latin America that “alludes to a lack of

safety”, referring both to crime and violence, as opposed to referring to a lack of personal confidence. Similarly, impunity is defined by the Oxford Dictionary as “exemption from punishment or freedom from injurious consequences of an action” but in Mexico, it is also used to refer to a generalised lack of punishment to crime where law-enforcement agencies and criminal justice institutions’ performance is deficient.

## Ethics

Interviews are social encounters, not simplified and passive means of collecting information (May, 2011). Interviews were conducted in accordance with ethics guidelines established by the Socio-Legal Studies Association.<sup>133</sup> Fieldwork commenced once ethics approval was granted by King’s College Ethics Committee.<sup>134</sup> For this, I submitted an application for ethical approval which concerned different sorts of information including details on: whether any risk to participants or to myself were involved; the aims, objectives and nature of the study; the methodology used including data collection and analysis; the way in which I would recruit participants and location where interviews were going to be held, as well as the different strategies used to ensure confidentiality and anonymity. Additionally to the form, I submitted an Information Sheet and a Consent Form which were also approved.

Prior to conducting any interview, I gave the Information Sheet to all possible interviewees where the main aims of the project were described, together with the funding agency that financed my studies and the themes that would be covered during the interview. Also, confidentiality and anonymity protections were described where all data would remain concealed so that only my supervisor and I accessed the data, and any details of the interviewees would remain closed. All participants’ names and identities were kept anonymous, as expressed in the Information Sheet. If a personal characteristic such as age or gender allowed indirect identification of the interviewee, that information was not used in order to guarantee anonymity. For instance, because not many women hold higher posts within the judiciary, gender is not mentioned, so all judges are referred to as if they were men. In addition, to specify the rank or court of a particular interviewee might facilitate their identification, so this was

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<sup>133</sup> SLSA Statement of Principles of Ethical Research Practice. Consulted at: <http://www.slsa.ac.uk/ethics-statement> 13 May 2012.

<sup>134</sup> The Ethics form which was submitted and the Information Sheet (in English and Spanish) are contained in Appendix 1.

not mentioned in the analysis except for those occasions where the post or rank helped the understanding of the comments made by the interviewee. The data presented here ensures that respondents remain unlinked to the views, accounts and commentaries they shared. In addition to anonymity and confidentiality, I drew on further security measures such as encrypted documents and recordings to safeguard the confidentiality of the collected data.<sup>135</sup> Throughout the entire process of this study, the researcher maintained the confidentiality of all participant responses. For this purpose also I decided not to include the name of the states but rather use the labels of HM and LM states to prevent the identification of interviewees.

The Consent form, though approved was not used, in light of the way in which access was negotiated, as already described. Consent was not registered in a written form but was clearly stated by interviewees by accepting or denying to participate in an interview. Interviewees were also made aware of their right to withdraw from the interview at the moment of conducting the interview or afterwards. If respondents wished to withdraw any information, that data was not used in the analysis. Happily, no interviewee asked to withdraw any information.

Ethics considerations concerned interviews and not judgements because I accessed only public versions of judgements. Under the Law of Personal Data Protection, the names, addresses and other personal information concerning defendants are eliminated in public versions by the courts who issue the judgements. In addition, names of the judges sometimes were removed from the public versions of the judgements. The name of the judges or the number of the courts were not referred to at all in the research in order to eliminate any chance of identifying the judge who issued a particular judgement.

## Conclusion

This research is a case study of the federal judiciary in the current Mexican context, in which federal judgements in two different states (so called LM and HM states) were analysed in depth. A qualitative approach was used to address the research questions using semi-structured interviews, primarily with judges,

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<sup>135</sup> I only conducted one serendipitous interview before submitting the ethics form to the Research Ethics Office at King's College. This interview was an opportunity that arose during the initial stage of the research, many months before the fieldwork began. I contacted my supervisor and the Ethics Officers in advance and became registered as a signatory to the Code of Conduct for Serendipitous Research in order to be able to use the interviewing material.

and archival material concerning specific criminal cases. Data collection and data analysis was strongly guided by the enemy penology paradigm, in line with other theories on judicial behaviour and judicial decision making, as well as denial theory and cognitive dissonance. The comparability of these states was possible as their crime rates are not so different, particularly in light of the wide variations in crime rates across the country. At the same time, the possibility of accessing members of the federal judiciary and other members of society in these states made it feasible to pursue a comparative case study of the federal judiciary.

Plans and actual experiences were described above in detail in order to provide a thorough overview of the way in which the data was collected and examined. This aims to transparent the way in which the different building blocks were put in place that sustain the claims made in the thesis.





## Judgement analysis

### Introduction

A judgement is the concluding document issued by a trial court, in which the verdict and the sentence are decided. Mexican judgements tend to include a description of the evidence produced during pre-trial and trial proceedings, the arguments advanced by the judge over how much weight to give each piece of evidence, and the arguments that led him or her to acquit or convict. The judge also gives the reason for imposing a particular sentence. Most judgements are lengthy,<sup>136</sup> because they often include testimony transcripts, legal provisions and precedents expressively transcribed. In consequence, judgements are rich sources of information because they give an approximation of what actually happened during the trial and explain how the verdict was reached.

The guiding question pursued in this thesis was to find out whether judges embraced and reproduced an enemy penology paradigm, reflected in their performance and their views; and to know if judges located in an unsafe and militarised environment decided differently than those located in a relatively safer environment. This chapter focuses on their performance mirrored in judgements issued by first instance judges. Enemy penology was sought in ways in which judges described defendants, for instance when determining the quantum of the sentence bearing in mind the offences charged and the ways in which those offences occurred. Also, enemy penology was initially expected to be found in ways of curtailing procedural rights during proceedings, for instance, reducing chances to produce evidence or in ways in which evidence was pondered. Custodial remand was not examined as this is generally ratified by judges in a compulsory manner. Finally, sentencing, which is also contained in judgments, seemed to be the ideal place to look for any kind of enemy penology value. Overall, enemy penology was not present in judgements from both locations, as will be discussed throughout the chapter. Also, decisions were found to be distinctively uniform across the studied states.

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<sup>136</sup> A rough average of judgements' length is approximately 80 pages per judgement.

The chapter's main interest is to present ways in which judges respond to or address several themes during proceedings such as circumstantial evidence, evidence produced by the defence and by the prosecution, drugs' illicit market and violence or sentencing. However, the chapter also includes a description of particularities of cases in order to contextualise judges' decisions, such as main characteristics of defendants or the type of circumstances in which offences occurred. This discussion does not intend to review judicial determinations of guilt or innocence.

The chapter is divided into the following sections: defendants; indictments; parties; circumstantial evidence; police in judicial proceedings; judicial overview of police testimony; the illicit drug market and violence; and sentencing and appeals. The conclusion contains remarks on the similarities and differences, as well as themes concerning the context, enemy penology in decision making and uniformity and consistency in judicial decision making.

In total, 40 judgements of drug-related offences were analysed, 17 from the LM state and 23 from the HM state. All cases but one were initiated between 2007 and 2012. This sample of judgements is not and does not attempt to be representative, nevertheless, the observations and analyses of these are presented in a more quantitatively manner to give the reader a sense of proportion. The judgements analysed here were issued by many different judges; not only were the judgements issued in 14 diverse courts, but throughout this time period some courts were headed by different judges, some having been assigned to different locations or promoted. Cases from the LM state are referred to by LMC and the number I assigned to it, those from the HM state are referred to by HMC followed by the subsequent number.

Table 7.1. Overall number of cases and courts

	LM state	HM state
Number of cases	17	23
Number of defendants	20	25
Convictions	17	19
Acquittals	0	4
Number of courts	11	6

\* The examined judgments from the LM state were issued by 8 of the 11 courts; whereas those from the HM state were issued by all courts.

## Defendants

Much personal data related to the defendant is collected during trial but hardly any of this information is available in public versions of judgements. The available data concerns gender, income and criminal record, which tend to be mentioned in the judgment when the sentence is decided.

Table 7.2. Defendants' characteristics

	LM state*	HM state**
Number	20	25
Gender	Male	Male
Income per week	350 to 2000 pesos* (17 to 1000 pounds)	850 to 5,000 pesos* (42 to 250 pounds)
Previous convictions	3	2
Addiction	17	14

\* 2 defendants stated to have no income and this data was not available in 5 cases; addiction information was not available in 1 case.

\*\* 3 defendants stated to be unemployed and income information was not available in 11 cases; previous convictions and addiction information was not available in 2 cases, respectively.

The cells coloured in grey highlight commonalities between states; the white cells highlight differences found.

As Table 7.2 show, there were 45 defendants involved in the examined judgements; 20 from the LM state and 25 from the HM state. In both areas, all defendants were male and most were being tried for the first time. In the LM state, three defendants had previous convictions, two of which were for drug-related offences (LMC4 and LMC12), while the third defendant (LMC11) had committed aggravated battery and aggravated theft. Drug addiction is examined by a toxicology expert once proceedings begin in the prosecution agency.<sup>137</sup> The proportion of drug addicts was larger in the LM state, where 85 percent of defendants were reported to have some kind of drug addiction (17 out of 20) as opposed to 56 percent from the HM state. This aspect is particularly relevant, as some courts relied on this fact to argue in favour of finding the defendant guilty for a non-serious offence. Information on addictions was available in 37 judgements.

<sup>137</sup> Defendants in LMC4 and LMC7 appeared not to use drugs; in LMC5 this information was not available. This information was not available in LMC5 and LMC21.

## Indictments

### *Charges*

The type and frequency of offences charged were similar in both locations. The most common offence was possession with intent to supply, followed by simple possession. Cases of supply appeared to be the least frequent in both places, and cases that involved charges concerning firearms were only found in the HM state though these cases were only five, as Table 7.3 show.

TABLE 7.3. OFFENCES AND DRUGS INVOLVED

		LM state	HM state
Offence*	Simple possession	9	7
	Possession with intent to supply	10	14
	Supply	3	5
	Firearms related offences	0	5
Quantity and type of drugs involved**	Marijuana	9 cases (total amount: 2.7 kgs; average: 300 grs)	14 cases (total amount: 11.5kgs; average: 833 grs)
	Cocaine	5 cases (total amount: 33 grs; average: 6.6 grs)	9 cases (total amount: 330 grs; average: 36.5 grs)
	Several types	0	5
	Other	3	2

\* Data based on the final verdict.

\*\* The sum and average of marijuana and cocaine are taken from all cases in which these drugs were involved.

The most common type of drug involved was marijuana, followed by cocaine in both locations. However, as Table 7.3 shows, the amounts of drugs involved were much higher in the HM state than those found in the LM state.

The number of suspects involved tended to be only one in the vast majority of cases. In four cases in the LM state, defendants faced more than one charge for drug-related offences. In three of the four cases, defendants were charged with possession with intent to supply, and supply; the fourth case involved simple possession along with possession with intent to supply. By comparison, nine defen-

dants in the HM state were indicted for several drugs offences. In five cases, from that state, defendants were additionally indicted for firearms-related offences, and in the other four, defendants faced several charges of possession with intent to supply, supply, and drugs cultivation but this last was dismissed by the court.

### *Circumstances of the cases*

The circumstances in which the alleged crimes were carried out varied, and in some cases these circumstances were contested by the defence. The spectrum included petty offenders who were arrested incidentally and drugs were found on them; cases where defendants maintained that drugs had been planted on them; and defendants who were under police investigation for systematic supply of drugs or where defendants' homes were searched. Within that same spectrum police and army participation mainly in the HM state were also important.<sup>138</sup>

Almost half the defendants in the LM state confessed to possession of the drugs and said the drugs were for their own personal use, as opposed to for supplying them.<sup>139</sup> For example, the defendant in LMC2 admitted possessing the marijuana, which he used to alleviate back pain. In two cases, defendants were stopped by the police for making too much noise. The police then found they were carrying drugs. The defendant in LMC3 had 26 clonazepam pills in his possession, while the defendant in LMC17 was carrying 99 grams of marijuana.

In the HM state, eight defendants confessed to possessing the drugs found.<sup>140</sup> For instance, two suspects in detention were searched by law enforcement agents, one in prison and the other in the police station, and in each case small amounts of cocaine were found on them.<sup>141</sup>

In many cases, defendants were arrested because the police, after following and searching them, found drugs on them or the suspects were allegedly selling them. Not all defendants admitted owning the drugs they were allegedly holding when arrested. In several cases, defendants alleged the drugs had been planted on them.<sup>142</sup> Others claimed to have no knowledge of some of the drugs found; for example, the defendant in LMC8 confessed that the marijuana in his possession was his, whereas he had no knowledge of the diazepam pills that were also found on him.<sup>143</sup>

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<sup>138</sup> The military participated in nine cases in the HM while only one case in the LM state.

<sup>139</sup> LMC2, LMC3, LMC7 though not all defendants, LMC8, LMC9, LMC10, LMC16 and c17.

<sup>140</sup> HMC1, HMC4, HMC5, HMC8, HMC10, HMC12, HMC20 and HMC21.

<sup>141</sup> HMC3, HMC4.

<sup>142</sup> LMC4, LMC6, LMC5 from the LM state.

<sup>143</sup> This was also the case for the defendant in LMC12 who acknowledged owning marijuana

Another type of case concerned police investigations in particular locations where drugs were reported to be sold. According to the police in HMC6 for instance, once they witnessed people buying drugs they detained the buyers, who later testified against the defendant for having supplied them the drug. In some of these cases a property search was conducted after the police witnessed drugs being sold which led them to look for drugs inside the defendant's premises.<sup>144</sup>

In the HM state, I traced several types of law enforcement operatives. Some cases were initiated when the police or army received an anonymous report about a person having drugs or storing a firearm at a particular address.<sup>145</sup> In response, the police or army went to that address and stopped suspects, searched and found illegal objects such as drugs or firearms, together with other items such as mobile phones or money. Also in the HM state, several arrests resulted from checkpoints established across the state as part of the federal program to fight drug trafficking.<sup>146</sup> In HMC5 for example, the defendant was arrested at a checkpoint after the police found 249.5 grams of cocaine, together with American and Mexican currencies and three mobile phones.

Cases in which soldiers participated seemed to have common practices in which they declared they had searched the defendant who was found inside a vehicle and finding drugs and other objects.<sup>147</sup> In both of these cases, defendants testified to having been inside their homes when soldiers broke in.

A case from the HM state dealt with a raid on a house used for growing marijuana plants, where methamphetamines and dehydrated fungi were also found.<sup>148</sup> Three people, allegedly university students, were arrested; two of them were on the front porch and the other one was, allegedly, in the house. In this case, despite the quantity and variety of drugs found, only the person inside the house was tried and he was found not guilty because of insufficient evidence; the property search was poorly conducted, which meant that most of the evidence had to be discarded.

The military only participated in one case in the LM state whilst the involvement of the military in crime investigation was much more patent in the HM state as participated in 9 cases. In particular, the military appeared to conduct specific type of operatives including stop and search of suspects in checkpoints

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and solvents but not cocaine, all of which were found in his possession.

<sup>144</sup> HMC9, HMC17, HMC20 and LMC1, LMC4.

<sup>145</sup> HMC1, HMC15, HMC18, HMC21.

<sup>146</sup> HMC5, HMC13, HMC14, HMC19.

<sup>147</sup> HMC12 and HMC8.

<sup>148</sup> HMC7.

across the state and practicing property searches without a search warrant.

Overall, police (and military) intervention in a case is crucial to the verdict reached, as will be explained later in this chapter. Also, the circumstances in which offences occurred were very significant, because courts relied heavily on circumstantial evidence to reach verdicts, particularly in cases of aggravated possession. The circumstances of the cases examined, as described in judgments except for HMC15 did not show defendants to pose grave risk to society's safety so as to merit being considered enemies of society or a particularly violent or threatening context.<sup>149</sup>

## Parties

### *Prosecution*

Across all cases a trend was observed in which the prosecution's case relied on evidence produced solely during the pre-trial stage and failed to produce any evidence during trial. This generally included police officers' arrest reports and further testimony given at the prosecution agency; expert evidence regarding chemical report of the confiscated drugs that determined the type and quantity of the drug and toxicology tests made on the defendant; visual inspections of the drugs found by the prosecutor; and the defendant's statement. All this evidence is produced during pre-trial, where the prosecutor has wide discretion because he or she is in charge of the investigation and of preparing the indictment file. The court relies heavily on the indictment to begin proceedings. Evidence collected during property searches was also brought to court; one every four cases involved a property search.

Sometimes the pre-trial prosecutor produced further evidence, such as visual inspections of the premises where the drug was allegedly sold and witness statements on whether the defendant was or was not selling drugs. From the total number of eight cases that used witness statements to support the prosecution's case,<sup>150</sup> the court heard their statements directly only in two cases.<sup>151</sup> Nonetheless, the courts granted evidentiary weight to witness statements produced dur-

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<sup>149</sup> It is important to point out that it was found only in one case that the military faced members of a criminal group who appeared to be heavily armed, shot a soldier and a couple of members managed to run away through the rooftop. The judge included none of this information in the judgement. All of this is discussed in the section Drugs' illicit market and violence.

<sup>150</sup> HMC2, HMC6, HMC9, HMC17 and HMC20; LMC1, LMC5, and LMC6.

<sup>151</sup> HMC9 and LMC6. The witness deemed decisive did not appear before the court in LMC5.



ing pre-trial in four cases<sup>152</sup> despite the fact that the court never actually met those witnesses. In only two cases the judge refused to grant evidentiary weight to the witnesses' statements.<sup>153</sup>

For instance, in HMC2 the judge granted evidentiary weight to a statement made by a witness who failed to be identified by the prosecution and to appear before the court to participate in a confrontation hearing. The judge held:

When the prosecutor leads the investigation, he does so in compliance with the Constitution, and it would be illegal to deny weight to the witnesses' statements (provided by the prosecution) based on the fact that the witnesses were not found, because it would make the purpose of the investigation void (HMC2, p.40).

As a result, based on the fact that the sources of evidence produced during pre-trial essentially constituted the prosecutor's case, and that the prosecutor produced hardly any additional evidence, it could be suggested that the outcome of the cases was strongly shaped by what was produced and gathered during the pre-trial process. A common feature across most judgments (35 out of 40) was the reference to binding rulings which authorised granting evidentiary value to sources of evidence produced during pre-trial, particularly visual inspections and expert reports. Hence, these sources of evidence could be used by the courts despite the fact that they were not reproduced in front of the judge.<sup>154</sup>

Exceptions to this general trend were observed where the courts dismissed witness statements for lacking truthfulness or clarity concerning the events and for the witness not appearing in court. The witnesses that generally were involved in proceedings had allegedly bought drugs from the defendant, so their statements were relevant for corroborating either the intent to supply or actual supply. As will be discussed below, the evidence that courts used to reach a verdict relied mainly on police and military accounts paired with circumstantial evidence.

In sum, the prosecution's case generally relied on the limited sources of evidence that were produced during the pre-trial stage. Despite this, the courts convicted in 90 per cent of the cases and subsequently held in only three cases that the prosecution produced insufficient evidence.

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<sup>152</sup> HMC2, HMC6, HMC17 and HMC20.

<sup>153</sup> LMC1 and LMC5.

<sup>154</sup> Non-binding rulings titled: "Prosecutor, constitutional faculties, in pretrial proceedings, ocular inspection."; and "Prosecutor. Pretrial. Evidentiary weight assigned to his procedural doings in this stage. It does not contravene constitutional rights."

## *Defence*

Unlike the prosecution, evidence provided by the defence was generally produced during trial proceedings. All defendants have the constitutional right to be defended during both pre-trial and court proceedings. Defendants may have either private or public legal support. Public legal support pays for one barrister at the prosecution agency during the pre-trial process and another at the trial itself.

Evidence produced by the defence may seek two main purposes: to disprove the prosecution's case by sustaining an alternate version of the facts or to receive a lenient sentence. The defence produced evidence in all but five cases;<sup>155</sup> from those 35, the evidence was intended to sustain the defence's case in 29 cases. In more than half the cases, witness evidence was produced, which included police testimony and cross-examination as well as other eye-witnesses (22 cases). Another common piece of evidence produced was confrontation hearings<sup>156</sup> generally held between police and eye witnesses and the defendant (18 cases), as well as expert reports on subjects including drug addiction, forensic medicine, and engineering. Visual inspections and documentary evidence were less common. Documents varied from land registry records, reference letters from employees, to character references from anyone who could speak on behalf of the defendant.<sup>157</sup>

A trend observed across the vast majority of cases was the courts' readiness to dismiss evidence provided by the defence. From the 29 cases where the defence produced evidence to support its version of the facts, only in two cases (from the HM state) upheld it and it was disregarded in the rest. In the judgments' contents, evidence produced by the defence occupied much less space and attention than the prosecution's case and was given a few pages at best. The courts used different arguments to dismiss defence evidence, depending on the type of evidence.

The most frequently used arguments can be grouped as follows: **FIRST**, courts dismissed defence statements, including the defendant's, on the basis that these claims embodied only a defensive strategy (11 cases) and also maintained that allowing the defence to deny all facts without offering any evidence would invalidate all that had been produced during proceedings which would foster impunity (10 cases). **SECOND**, courts discarded defence statements because there was no corroborating evidence (10 cases). **THIRD**, courts dismissed claims that de-

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<sup>155</sup> LMC8, LMC10, LMC13 and c16; LMC21.

<sup>156</sup> For a brief definition, see Chapter 4.

<sup>157</sup> Character letters on behalf of the defendant are intended to persuade the judge to impose a lenient sentence on the defendant.

rived from confrontation hearings because no relevant or new information was provided and participants only repeated their previous allegations (eight cases).

The outcome of the cases cannot be associated with the type of attorney; 70 percent of defendants had a public attorney, and the low proportion of acquittals were distributed among private (2 cases) and public (1 case) attorneys, as well as distributed equally in those cases where the defence failed to produce any evidence.

In sum, the decisive evidence was either circumstantial or that produced by law enforcement agencies such as the police or the army during the first stage of proceedings. Defence evidence was examined as secondary and witnesses' testimonies appeared to be easily disregarded. This trend was also found by Pásara (2006) when examining 82 judgments issued by criminal courts in Mexico City, in particular that judges failed to explain on what grounds was defence evidence discarded.

## Circumstantial evidence

Circumstantial evidence refers to different characteristics linked to the offence and the defendant, including quantity of the drug, the way and place in which the offence occurred as well as the time of day. The offence of possession of drugs with intent to supply is an example of a risk-related offence, where actual harm does not occur but circumstances suggest harm was probable (Aguilar López, 2008). In this type of cases circumstantial evidence plays an important role in demonstrating the offence. Defendants charged with this offence are found guilty when circumstances suggest that the harm, i.e. the supplying of drugs, was going to happen. Relevant circumstances concerning simple possession and possession with intent to supply are primarily: the quantity of drug found, the way in which it was packed —distributed in small packages or wrapped in a single one— the place and time of the arrest. The time of the arrest and the money found on the defendant were important only in a few cases.

### *Type and quantity of drugs*

The most common drug found in both locations was marijuana, followed by cocaine. Other drugs, such as heroin, methamphetamines, clonazepam and diazepam, as well as fungi, were involved but in lesser proportions than marijuana and cocaine. The quantity of drug found was significant in most cases, especially to determine whether the charge should be aggravated, i.e. with intent to supply, or simple possession. The amount was an essential argument to convict defendants charged for possession with intent to supply, where in all

cases courts stressed that the amount found indicated intent to supply. Legislation on drugs offences explained in Chapter 4 establishes the threshold to determine the seriousness of the offence, based on the quantity of the drug. Hence, according to the law, the quantity of the drug is decisive to determine the charge of, either simple possession, possession with intent to supply in a low-scale or possession with intent to supply on a large-scale. However, legislation leaves the door open for judges to consider other circumstances of the case such as the type of drug involved. Nevertheless, no consistent relationship was observed between the amount of confiscated drug and the convicted offence, as Tables 7.4 to 7.7 show. Cases in which several types of drug and drugs other than marijuana and cocaine are not presented in these tables.

Table 7.4 LM state marijuana cases: quantity and charge

LMC15	LMC11	LMC13	LMC5	LMC9 Def 3	LMC9 Def 1	LMC17	LMC14	LMC2	LMC9 Def 2	LMC1
13.7 g	38.7 g	45.8 g	52.03 g	58.6 g	66.6 g	99 g	107.5 g	121.1 g	979.3 g	1,120 g
SP	SP	SP	AP	SP	AP	SP	AP	SP	AP	AP

\*SP stands for Simple Possession and AP stands for Aggravated Possession.

Table 7.5 HM state marijuana cases: quantity and charge

HMC18	NC17	NC2	NC23	NC20	NC1*	NC12	NC16	NC19*	NC10
14.9 g	25.88 g	28.5 g	62.8 g	72.2 g	108.6 g	177.6 g	2,953 g	3,338.6 g	4,193 g
	AP and supply	AP and supply	AP	AP and supply	SP	SP	SP	SP	SP

\* Cases where defendants were also charged for possessing firearms were involved.

\*SP stands for Simple Possession and AP stands for Aggravated Possession.

Table 7.6 LM state cocaine cases: quantity and charge

LMC16	LMC12	LMC6 Def 1	LMC6 Def 2	LMC8	LMC10
1.1 g	3.5 g	4.4 g	5.8 g	7.9 g	10.4 g
SP	SP	AP	AP	AP	AP

\*SP stands for Simple Possession and AP stands for Aggravated Possession.

Table 7.7 HM state cocaine cases: quantity and charge

NC6	NC21*	NC3	NC13*	NC8	NC5
0.115 g	1.1 g	9.7 g	23.5 g	33.8 g	249.5 g
Supply	SP	SP	AP	SP	AP

\* Cases where defendants were also charged for possessing firearms were involved.

\* SP stands for Simple Possession and AP stands for Aggravated Possession.

As Tables 7.4 and 7.6 indicate, cases from the LM state involved smaller quantities of drugs than in the HM state. For example, the smallest amount of marijuana was 38.7 grams (LMC11) while the largest was 1.2 kilograms (LMC1). Similarly, the smallest amount of cocaine found was 1.1 grams (LMC16) whilst the largest was 10.4 grams (LMC10). Nonetheless, no link was observed between the quantity of drugs involved and the seriousness of the indicted offence. For instance, the defendant in LMC17 was carrying almost double the amount of marijuana the defendant in LMC5 carried but was charged with a less serious offence.

Similarly, in the HM state the quantity of drugs found did not match the seriousness of the charged offences. For example, HMC18 was the case that involved the lowest amount of marijuana (14.8 grams) but the defendant was tried for aggravated possession. By comparison, defendants that were carrying 2.9 kilograms (NC16) and 3.3 kilograms (NC19) of marijuana were charged for a less serious offences.

In fact, it was observed that cases in the HM state generally involved larger amounts of drugs than those from the LM state but this did not result in more convictions for serious offences. It is also noteworthy that the quantities of cocaine in cases in the HM state were much larger than those found in cases from the LM state. However, half of the cocaine cases in the HM state were indicted for simple possession whereas all but one cocaine cases in the LM state were indicted for aggravated possession.

In sum, even though legislation determines that quantities trigger different legal consequences—larger quantities escalate the level of seriousness of the indictment—in practice quantity does not predict or even indicate what charges will be pressed. It would therefore appear that factors other than quantity of drugs affect the final decision.

### *Level of addiction and quantity of drugs*

The severity of defendants' drug addiction, as given in toxicology reports, was taken into account by many judges in cases of simple possession. In these cases, defendants were carrying amounts of drugs above that were legally permitted

but judges argued that their drug addiction helped explain defendants were possessing excessive amounts of drugs.<sup>158</sup>

For instance, nearly all defendants convicted for simple possession from both the LM (nine out of nine) and the HM (six out of seven) states were drug addicts. In the vast majority of cases (six out nine cases from the LM state and five out of six of the HM state) the judge used this fact to argue that the drug was intended for their personal use, even if the amount was higher than permitted. In fact, in half the cases of simple possession from the LM state,<sup>159</sup> judges stressed that the defendant's addiction proved that the drugs were destined for their personal consumption, and the purpose or intent of selling could not be deduced solely from the drug quantity found. As a result, defendants charged for simple possession, although carrying amounts of drugs that corresponded to a more serious offence, were sentenced for simple possession because judges took into account the defendants' drug addiction.

The case LMC15 illustrates that judicial decision-making consider quantity along with the other circumstances of the case. The defendant was smoking marijuana when the police searched him and found 13.7 grams. He was charged and convicted for simple possession. The judge argued that drug addicts tend to acquire drugs that will last several days due to the risk of acquiring it. The fact that the defendant had suffered from a drug addiction for over seven years and that the police did not notice any illegal behaviour, or find any evidence to suggest intent to supply, showed there was no intent.

The case HMC12 is also illustrative. The defendant acknowledged possession of 177.6 grams of marijuana and said he was arrested in his home by soldiers who broke in. The judge held that although the amount of drug exceeded the allowed quantity for individual consumption, the way the drug was packed was typical of small consumers, and no other evidence suggested the defendant had the intention to supply the drug.

A striking difference was observed in cases tried for aggravated possession. In the LM state, the courts argued in six<sup>160</sup> out of eight aggravated possession

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<sup>158</sup> Results from Toxicology reports were sometimes described in judgements where they pointed out indications of a defendant's level of addiction such as the amount of drug found, his behaviour during the examination or whether any substance was found in his bloodstream or urine. Pre-determined amounts of drugs may not be sufficient to establish directly the existence or severity of drug addiction. The legal framework, however, establishes specific amounts of particular drugs were presumably destined for personal consumption, and the threshold that helps presume drugs were possessed with intent to supply, distribute, transport, or other activities. See Table. 4.1 Maximum drug doses legally authorised.

<sup>159</sup> LMC2, LMC3, LMC12, LMC15, LMC17.

<sup>160</sup> LMC1, LMC4, LMC5, LMC7, LMC9 and LMC16.

cases that the amount of drug carried by the defendant was decisive in demonstrating intent to supply, either marijuana, cocaine or heroin. In the HM state, the quantity of drugs found was decisive in nine<sup>161</sup> out of 13 cases.

In cases where defendants were reported to have a drugs addiction that were charged for aggravated possession, courts from the LM state systematically ignored their drugs addictions. By comparison, in the two cases where defendants appeared not to be addicts, judges emphasised that the toxicology reports helped demonstrate an intent to supply. This was not as visible in the HM state, because not all defendants charged for aggravated possession were reported to have an addiction problem. However, in five cases<sup>162</sup> the court used the lack of addiction to argue that possession of the drug could not be presumed to be for the defendant's personal use but rather for distribution. For example, in HMC17 the judge said:

The toxicology exam found he is currently not using any drug, which reinforces even more what is held in this judgment, as it is illogical that one person carries a drug if he is not addicted to it, and one would feel inclined to think that he had it to obtain an economic benefit from its distribution (HMC17, p.13).

It is clear that the relevance of addictions reported during proceedings depends on the offence charged in the indictment. This raises questions about the validity of arguments that support circumstantial aspects of a case, particularly the relevance of quantity of drugs and addictions.

### *Drug packaging and place of arrest*

Another important aspect considered by the courts to verify intent to supply was the way the drug was packed. In most cases, the drug was divided and wrapped in several small packages, which, according to judges, was a strong indication of intent. This was stressed in eight of the nine cases in the LM state where defendants were found guilty of possession with intent to supply, and in half of such cases in the HM state. However, in several cases of simple possession, drugs were also packed in separate wrappers, in three, 37 or even 175 different packages.<sup>163</sup> Hence, the way in which the drug is packed is not a decisive or relevant circumstantial data to demonstrate the intent to supply because in

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<sup>161</sup> HMC2, HMC5, HMC6, HMC13, HMC14, HMC15, HMC16, HMC17, HMC18, HMC19, HMC20, HMC22 and HMC23.

<sup>162</sup> HMC14, HMC15, HMC17, HMC18, HMC19.

<sup>163</sup> LMC2, LMC11, LMC12 and LMC13; HMC1, HMC3, HMC4, HMC8, HMC10, HMC12 and HMC21.



most cases drugs were found in separate packages, dealing with indictments for both simple and aggravated possession.

In addition, the place where defendants were arrested, either in a public space, such as the street or a public festival, was deemed relevant by courts, because being in a public space facilitates drug supply. In six out of eight cases from the LM state, the court relied on this argument to convict the defendant for aggravated possession, while the HM courts convicted only six out of 13 defendants, which indicates that courts in the HM state were less likely to use this argument to convict.

The following tables show the overt similarities concerning circumstances across cases whilst diverging in the way in which these concluded:

Table 7.8 Circumstances of LM cases for simple possession

LMC15	LMC11	LMC13	LMC9 Def 3	LMC17	LMC2	LMC3	LMC7	LMC12
13.7 g marij.	38.7 g marij.	45.8 g marij.	58.6 g marij.	99 g marij.	121.1 g marij.	26 clonaz- epam	5 diaz- epam	3.5 g cocaine
Drug addict	Drug a ddict	Drug addict	Drug addict	Drug addict	Drug addict	Drug addict	Drug addict	Drug addict
1 pack.	6 pack.	7 pack.	5 pack.	In a bag	2 pack.	unpack.	unpack.	20 pack.
On the street	On the street	On the street	On the street	On the street	On the street	In a shop	On the street	On the street

\* Marij. stands for marijuana; pack. stands for packages and unpack. stands for unpackaged.

Table 7.9 Circumstances of LM cases for aggravated possession

LMC5	LMC9 Def 1	LMC14	LMC9 Def 2	LMC1	LMC4	LMC16	LMC6 Def 1	LMC6 Def 2	LMC8	LMC10
52.03 g marij.	66.6 g marij.	107.5 g marij.	979.3 g marij.	1,120 g marij.	1.1 g heroin	1.1 g coca.	4.4 g coca.	5.8 g coca.	7.9 g coca.	10.4 g coca.
Not known	Drug addict	Drug addict	Drug addict	Drug addict	Not drug addict	Drug addict	Drug addict	Drug addict	Not drug addict	Drug addict
8 pack.	5 pack.	18 pack.	85 pack.	In a bag	In a bag	17 pack.	31 pack.	17 pack.	25 pack.	12 pack.
On the street	On the street	On the street	On the street	In his home	In his home	At a fair	On the street	On the street	On the street	On the street

\* Marij. stands for marijuana; coca. stands for cocaine; pack. stands for packages and unpack. stands for unpackaged.

From Tables 7.8 and 7.9, which concern cases from the LM state, it can be seen that circumstances are very similar. For instance many defendants convicted for the two types of offence were reported to have a drug addiction; most of them were arrested in a public space; and the vast majority carried the drug in more than one package.

Outcomes in LMC12 and LMC16 were strikingly different, despite many commonalities. The judge in LMC12 took the defendant's drug addiction into account, which led him to assume that the carried drug, 3.5 grams of cocaine, was for the defendant's personal consumption. By comparison, the judge in LMC16 disregarded the defendant's addiction, despite its corroboration by several expert examinations produced during trial, and argued that the defendant's intent to supply 1.1 grams of cocaine was demonstrated by the fact that he was in a public space—a fair or festival—which facilitates the distribution of drugs. It is worth noting that both defendants were arrested in public spaces, and the drugs involved in both cases were packed in separate bags, both of which factors are deemed to facilitate drug dealing. Nonetheless, LMC12 was sentenced to 16 months in prison, while LMC16, convicted of a more serious offence, received three years.

What can help understand these inconsistent (or at least contrasting) outcomes? Both of these cases were tried initially for simple possession, and the verdicts, contained in the intermediate resolutions, were appealed. An appeal was only granted in LMC16, where the appeals magistrate instructed the trial

judge to modify the charge and continue proceedings for aggravated possession; the appeal in LMC12 was not granted. The contrasting results of these cases sheds light on the strength of the higher courts shaping judicial decisions of the lower courts.

Cases from the HM state, except those where defendants were found not guilty, are contained in the following tables.

Table 7.10 HM cases of simple possession

NC1	NC3	NC4	NC8	NC10	NC12	NC21
108.6 g marijuana	9.7 g cocaine	73.7 g marijuana and 38 clonazepam	33.8 g cocaine	4,193 g marijuana	177.6 g marijuana	1.1 g cocaine
Drug user	Drug user	Drug user	Drug user	Drug user	Drug user	N/A
3 packages	1 package	In one bag	175 packages	In one bag	37 packages	4 packages
In his residence	In prison	In police station	In his residence	On the street	In his car	In his residence

Table 7.11 HM cases of aggravated possession

C2 **	C5	C6 *	C13	C14	C15	C16	C17 **	C18	C19	C20 **	C22	C23
28.5 g marij.	249.5 g coca.	.115 g coca.	23.5 g coca.	203.7 g coca. and 3.2 g coca.	37.8 meth.	2,953.6 g marij.	25.8 g marij.	14.9 g marij.	2228.6 g marij.	72.2 g marij.	191 g marij. and 8.6 g coca.	62.8 g marij.
Drug user	N/A	Drug user	Not drug user	Not drug users	Not drug users	Not drug user	Drug user	Not drug user	Not drug user	Drug user	Drug user	Def. 1. Not drug user; Def. 2 Drug user
N/A	In a bag	2 pack.	95 pack.	37 and 20 pack.	In a bag	In a bag	Many pack.	5 pack.	1 pack.	21 pack.	84 and 44 pack.	In a bag
On the street	On the street	In his home	On the street	On the street	In his home	On the street	In his home	On the street	On the street	In his residence	On the street	In a residence

\* Cases where the offence was supply.

\*\* Cases where defendants were convicted for possession with intent and for supply.

\*\*\* Marij. stands for marijuana; coca. stands for cocaine; pack. stands for packages and unpack. stands for unpackaged.

As Tables 7.10 and 7.11 show, in most cases drugs were divided into several packages. However, the place of arrest varied widely because operations carried out in the HM state focused on searching premises and suspicious vehicles at checkpoints across the state. It is noteworthy that despite this, several defendants were convicted for aggravated possession while being in their homes when arrested.

### *Judicial approval to rely on circumstantial evidence*

The use of circumstantial evidence appears to be widely accepted within judicial decision-making. In more than half of the examined judgements,<sup>164</sup> circumstantial evidence sustained both serious and lenient charges. In cases dealing with charges of possession with intent to supply, all courts except one (LMC1) from the LM state and two-thirds of courts from the HM state referred to binding rulings issued by constitutional tribunals permitting reliance on circumstantial evidence. For example, one of the most commonly quoted precedents in both locations establishes that intent to supply can be verified by indirect or circumstantial evidence.<sup>165</sup> Another precedent holds that courts may rely on the specific circumstances of the case, such as drug quantity or packaging. According to that precedent, once the quantity or packaging was demonstrated, inferences could be drawn to confirm the defendant was guilty or that the charged offence did occur.<sup>166</sup>

An illustration of the inclination to rely on circumstantial evidence can be seen in LMC4, where the judge argued that using circumstantial evidence was essential to prove the intent to supply. If circumstantial evidence was not considered, the defendant would justify his criminal behaviour by claiming the drug was for his personal use rather than for its supply:

On occasions only based on this (circumstantial evidence), the trial can be held satisfactorily; not understanding it this way, the drug dealer tends to justify himself with the excuse that the drug was for his personal use or by not acknowledging the drug's existence (LMC4, p.144).

A possible reason to rely heavily on circumstantial evidence to reach a verdict may entail a genuine reluctance to acquit defendants based on insufficient evidence, particularly if the judge feels convinced of the defendant's guilt, and

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<sup>164</sup> 9 judgements out of 17 from the LM and 14 judgements out of 23 from the HM state.

<sup>165</sup> Binding ruling titled: "Drug related offence. The intent or purpose of possessing the drugs, constitute an essential element of the offence's legal description established in article 195 of the Federal Criminal Code that can be demonstrated with circumstantial evidence."

<sup>166</sup> Binding ruling titled: "Circumstantial evidence, its assessment."

bearing in mind that many precedents support this. Another interpretation may be that judges have a sincere concern for impunity.

Concern for impunity is embedded in popular and frequently quoted precedents. For instance, in 13 different cases the court quoted a binding ruling that holds:

When a presumption/suspicion against the defendant can be derived from the set of circumstances, it is the defendant who should demonstrate his case against (the prosecution's incriminations) and not try to prove facts by giving an uncorroborated explanation. Admitting his unilateral statement as valid would destroy circumstantial evidence's mechanism and facilitate the impunity of the defendant, making ineffective the chain of (incriminating) presumptions by the sole statement of the defendant, which is inadmissible.<sup>167</sup>

In a similar tone to this precedent, two judgments from the LM state stated:

To not use circumstantial evidence, would occasionally lead to the impunity of several offences: in particular, those cunningly committed would provoke a state of serious social defencelessness (LMC4 and LMC14).

Several judges from the HM state dismissed the defendant's statement, saying that to take his uncorroborated statement as valid would facilitate impunity (NC17, HMC18), notably similar to the content of the precedent quoted above.

The fact that these arguments are taken from precedent reveals that they are deeply embedded in the legal fabric to the extent that trial judges use them as their own. The fact that quoted rulings are both binding and not binding suggest that, as Lindquist & Cross held, arguing against them is far too burdensome (2005). Equally, an inclination to decide cases based on circumstantial evidence reveals a systematic way of deciding cases, illustrating the reinforced practice to use templates to issue judgements and, thus, manage workloads and at the same time avoid reversals.

The type of defendants and circumstances of the cases from the both states do not mirror what was lived in the HM state; defendants do not appear to pose particular risk or danger. At the same time, judges' determinations on evidence do not mirror a particular concern to rule against defendants with the greatest amounts of drugs. Hence, to this point an enemy penology environment is not observed in the cases examined but more importantly, judges do not appear to be reproducing this paradigm's traits. Knowingly, these cases do not involve organised crime offences which arguably would be the place to look for enemy penology mirrored in judgements. However, the main interest of this thesis is to look

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<sup>167</sup> Binding ruling titled: "Confession, lack of it."

for enemy penology in ordinary cases –arguably, a spill over effect- which to this point has not been found. What then accounts for this brings us back to strict precedent adherence of trial courts to both binding and non binding rulings.

## Police in judicial proceedings

In criminal proceedings, evidence provided by law enforcement agents, such as police officers and soldiers, is essential for pursuing convictions, and the cases investigated for this research were no exception. Police and army evidence consists of reports describing the events, such as the arrest and how the offence occurred; statements rendered in front of the public prosecutor; and confirmation of these statements before the court.

Soldiers participated in the arrest of defendants in 10 cases, nine of which were in the HM state. Throughout the analysis, no difference was observed between evidence provided by the police and evidence provided by the military. The circumstances of the arrests of the cases examined varied; soldiers detained suspects in checkpoints or in their homes during a cateo or property search without a warrant. By comparison, police officers arrested suspects allegedly walking on the street or after interrogating witnesses. Despite the fact that circumstances were different, the report produced to describe the arrest and the way in which the offence was taking place was similar. Judicial argumentation remained uniform in considering evidence and reaching a verdict, regardless of the type of law enforcement agent involved. According to one public defence attorney from the HM state, judges viewed police and soldiers as equal and treated them as such during court proceedings.

Evidence provided by the police and army was crucial in the vast majority of cases. Only in three cases from the LM state<sup>168</sup> and five from the HM state<sup>169</sup>, did other witnesses form part of the prosecution case. Law enforcement agents are crucial actors in criminal proceedings, because they are responsible for arresting and bringing suspects before the public prosecutor. They are also relevant because they tend to catch defendants red-handed, thus becoming primary witnesses. Evidence provided by the police and army automatically complies with the primary evidence principle (*principio de inmediatez* described in Chapter 4). Evidence produced closer to the crime is presumed to have greater validity than that produced later, because the initially produced evidence is presumed to be truthful and undistorted.

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<sup>168</sup> LMC1, LMC4 and LMC5.

<sup>169</sup> HMC2, HMC6, HMC9, HMC17 and HMC20.

### *Versions of the arrest and versions of the offence*

Police and army evidence attempts to prove two things: the way in which the arrest took place and the way in which the offence occurred. The description of the “facts” by law enforcement agents did not always coincide with that of the defendants’. Similar versions were observed in several cases, such as in LMC3, where both the defendant and police officers agreed that the defendant was stopped while walking along the street with his wife and that he was carrying the drug when searched.

In contrast, in some cases the reports of the events were entirely different. For example, in LMC13, police alleged that they saw the defendant with a plastic bag containing seven packages of marijuana outside a place of entertainment. When the defendant saw the police he tried to escape and was arrested. The defendant, on the other hand, alleged that he was in a different location, and that an unknown person walked by, saw the police and dropped a bag. One of the police officers ran after the unknown person and the other stood beside the defendant. The officer was unable to catch the unknown person, so the officers arrested the defendant instead.<sup>170</sup>

In five cases from the LM state<sup>171</sup> and six cases from the HM state<sup>172</sup> the versions of the police and the defendants coincided. Differences were found in 24 cases in total. There were differing versions of the way in which the arrest took place. For example, the only difference in the account of the events in LMC3 was that the defendant alleged he was beaten up by the police and by the shop-owners when he was arrested.

There were important differences concerning the origin and ownership of the drugs in eight cases from the LM state<sup>173</sup> and nine from the HM state<sup>174</sup>. For instance, in LMC5, the defendant held that he was carrying only some of the drug and the rest belonged to his landlady, who had extorted him to sell it. The landlady was released, so the defendant claimed that the drugs found on her had been placed on him by the police. In HMC18, soldiers received an anonymous report and when they saw the defendant whose characteristics coincided

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<sup>170</sup> The defence in this case failed to produce statements of witnesses who were present when the defendant was arrested. The defence’s insufficient evidence was highlighted by the court in the judgment and illustrated by the fact that the judge himself ordered a confrontation hearing between the police and the defendant to resolve several contradictions.

<sup>171</sup> LMC2, LMC3, LMC11, LMC15 and LMC17.

<sup>172</sup> HMC1, HMC4, HMC5, HMC10, HMC12 and HMC21.

<sup>173</sup> LMC1, LMC4, LMC5, LMC6, LMC7, LMC12, LMC13 and v14.

<sup>174</sup> HMC2, HMC6, HMC8, HMC14, HMC15, HMC16, HMC18, HMC22 and HMC23.



with the report, started following him and when stopped and searched found the drug on his right pocket. In contrast, the defendant testified that he was in the described location by the soldiers because he was waiting for a friend, and he was stopped and arrested by soldiers who blindfolded him and drove him around. According to him, the drug was not his.

Differences linked to the intent to supply them were also found in ten cases from the LM state<sup>175</sup> and twelve cases from the HM state<sup>176</sup>. In LMC14, the defendant alleged consistently that he not only did not own the drugs but also that the police broke into his home and planted the drug on him. A similar pattern appeared in LMC4, where the defendant alleged the drug found during the property search was planted by the police. In HMC12, soldiers found a car parked with the driver in, so searched the person inside the vehicle and found the drugs and two scales. According to him he was not in his vehicle when arrested but in his home when the soldiers broke in and found the drug; he agreed the drug was his but for his own personal use.

As already mentioned, the prosecution tended to build their case on evidence produced exclusively during the pre-trial stage, principally the police statements. The fact that divergence in the accounts of the events was found in the majority of cases did not undermine the influence exerted by police evidence on the outcome of the cases.

## Judicial overview of police statements

Police officers are bound by witness evidence rules. According to article 289 of the Federal Criminal Proceedings Code, statements are valid and presumed to be truthful if witnesses meet several requisites. These are: witness's age, training, unbiased judgment, maturity to understand the nature of the facts which were appreciated through the witness's senses and that the statement is expressed with clarity. In consequence, courts are required to assess whether witnesses, including police officers, comply with these requisites so that their testimony is granted appropriate evidentiary weight. In other words, courts treated police officers as regular witnesses despite holding public positions.

In 37 out of 40 cases,<sup>177</sup> courts accepted that police officers complied with all the requirements established in article 289, including those in which torture

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<sup>175</sup> LMC1, LMC4, LMC6, LMC7, LMC8, LMC9, LMC10, LMC13, LMC14 and LMC16.

<sup>176</sup> HMC2, HMC6, HMC8, HMC11, HMC13, HMC14, HMC15, HMC16, HMC18, HMC20, HMC22 and HMC23.

<sup>177</sup> Except for LMC1; LMC3 and LMC7.

and mistreatment practices were alleged by defendants, with no further discussion or evidence required to corroborate this. Courts gave police statements strong evidentiary value based on several precedents discussed below.

### *Impartiality*

A clear tendency was observed for judges to presume that law enforcement agents were impartial. This seems to stem from precedents. A non-binding ruling issued in the 1970s was quoted in 28 of the 40 judgements. The ruling states that police statements, far from being deemed partial because the officers concerned were involved in the arrest of the defendant, ought to have decisive weight because they were present during the commission of the crime.<sup>178</sup>

Presuming police officers to be impartial stems from the 1970s ruling and is reproduced in judges' decisions examined here. For instance, the judge in LMC6 held:

As public servants, they have complete impartiality based on the fact that there is no evidence that suggest the opposite (LMC6, p. 95).

Furthermore, in LMC4 the judge asserted:

Police officers, based on the duties with which they are entrusted, deserve credibility, and it is not probable that they planted the drug on the defendant (LMC4, p. 181).

In addition, several judges from the HM state made remarks concerning law enforcement agents' role in crime prevention.<sup>179</sup> For instance, in HMC5 the judge stressed:

There is no indication that [police officers] testified falsely or had the intention to unfairly involve the defendant, as the duty that they perform is independent and its only purpose is crime prevention (HMC5, p. 13-14).

Similarly, the judge in HMC18 argued that soldiers' statements should be upheld because they act as social safety guardians. As a consequence, the judge rejected the defence's allegations.

### *Corroboration*

In ten out of the 40 cases,<sup>180</sup> the courts held police statements to be reliable, because all officers participating in the investigation corroborated the facts. Corroboration made police statements irrefutable because their statements

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<sup>178</sup> Non binding ruling titled: "Police officers, evidentiary weight of their statements."

<sup>179</sup> HMC5, HMC11, HMC14, HMC18 and HMC22.

<sup>180</sup> LMC4, LMC12, LMC13 and LMC15, and HMC8, HMC13, HMC19, HMC21, HMC22, HMC23.

throughout the pre-trial and trial proceedings were consistent, not because there was a third source of evidence validating their statements. In this context, corroboration seems to be equivalent to confirming a particular version of events repeatedly without an alternate source of evidence.

These arguments are embedded in precedents which were observed in several judgements from the HM state. These reveal that, on the one hand, suspicion about identical statements does not arise where police statements, as opposed to other type of witnesses, are concerned, because the officers all participated in the same operation and could reasonably be expected to remember the events in similar terms. Hence, as a ruling establishes, it is “imperative to consider these as effective evidence”.<sup>181</sup> This ruling appears to reflect judges’ general attitudes towards police evidence. On one hand, it was observed across cases that the core evidence used to convict is law enforcement agents’ statements, and on the other, that these statements are considered valid almost by default. Furthermore, it appears that evidence produced by the defence, if any, does not succeed in proving its case or undermining police’s version of the facts.

### *Exceptions*

Police evidence was discarded in a minority of cases. In the HM state, this mainly occurred in cases where property searches were conducted, either irregularly or where the information gathered did not match with the defendant’s description of his address and physical appearance.<sup>182</sup> In the LM state, it was found that when courts examined supply charges, three of the courts that dismissed these charges pointed out that police officers had contradicted themselves (LMC4) and that their statements were not corroborated (LMC5) by any other source of evidence.

### *Property searches*

Property searches were carried out in a quarter of the cases but were more commonly carried out in the HM state than in the LM state.<sup>183</sup> In most cases the property search played a decisive part in their outcome, even those in which defendants were acquitted.<sup>184</sup> In the majority of property searches, a court issued an order before it was carried out, but in three cases, law enforcement agents

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<sup>181</sup> Non binding rulings titled: “Witness statement, has full effectiveness when police officers coincide about the way in which the arrest and the confiscation of the drug took place.” and “Police arrest report. Its validity when ratified before the prosecution.”

<sup>182</sup> HMC7 and HMC9.

<sup>183</sup> 8 cases from the HM state and 2 from the LM state.

<sup>184</sup> HMC7 and HMC9.

broke into the premises without a court order, because an alleged offence was in process. In these cases evidence was assumed to be valid, relying on a binding ruling issued by the scjn<sup>185</sup> which authorises the use of evidence collected in a property search if an offence was occurring.

As discussed in Chapter 3, the National Commission of Human Rights has received an increased number of complaints about abusive practices by soldiers and police officers during property searches, including beatings and theft. Allegations of this kind were observed in half of the cases where property searches were carried out. For example, in hmc6 a property search was conducted in a place which, according to the defence, was not the defendant's home, because he lives in the u.s.a. The defendant's sister was a witness to the property search and, according to the official report, she had stated that her brother lived there. In stark contrast, the defendant's sister claimed before the court that her alleged statement produced during the property search was false because her brother lived in the u.s.a. The defendant's residence was the core of the defence case but, according to the court, the defence failed to produce sufficient evidence to sustain it. The defendant was convicted of supplying 115 milligrams of cocaine and sentenced to 10 years imprisonment.

### *Police mistreatment*

Police mistreatment was alleged by defendants in 11 cases involving both police and soldiers.<sup>186</sup> These practices included beating up the defendant, stealing money, threatening to arrest the defendant's family, blindfolding him and driving him around before presenting him to the prosecution agency, all of which is described in Table 7.12.

Forensic examination results were available in most judgements from the LM state, and these results described the defendants' injuries. By comparison, the vast majority of judgements from the HM state mentioned that medical examinations were carried out but failed to include the results. In fact, the medical examination results were only included in three out of 23 judgements.<sup>187</sup> The lack of results recorded in the HM state makes it difficult to verify whether defendants' allegations of mistreatment had any kind of documentary backup. Omitting these results raises questions of police and army accountability and, more

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<sup>185</sup> Binding ruling titled: "An authority's interference in a premise without judicial warrant. Effective official doings and effectively produced evidence when it is based on a flagrant offence".

<sup>186</sup> LMC3, LMC4, LMC10, LMC12, LMC13 and LMC14; HMC8, HMC12, HMC18, HMC22, HMC23.

<sup>187</sup> HMC9, HMC10 and HMC19.

importantly, of the possibility that the courts are concealing mistreatment.

The courts' reaction to mistreatment allegations, if existent, essentially favoured the police. Reactions varied widely, ranging from making no comment on the defendants' statements and examination results, to acknowledging the defendants' injuries without any holding anyone accountable or initiating any further enquiries, to suggesting that the physical evidence of mistreatment were possibly due to the defendant. These comments are further described in the table below.

Table 7.12 Defendants' allegations on police/military mistreatment and judicial responses

Case	Irregular property search	Beatings	Stole money and other belongings	Threats to arrest family	Blindfolded the defendant	Extended detention	Judicial response
LMC1			x				Made no comment or reference
LMC3		x					Acknowledged the defendant's injuries
LMC4	x		x	x			Money's ownership was not demonstrated, possibly resulted from drug dealing
LMC10		x					Mistreatment marks do not signify torture but probably resistance to be arrested
LMC12		x					Acknowledged the defendants' injuries
LMC14		x					No evidence to suggest the police were perpetrators
NC8	x	x				x	Made no comment or reference
NC12	x						The defendant did not provide any evidence
NC15, NC22						x	Made no comment or reference
NC16		x					Acknowledged the defendants' injuries
NC18						x	Made no comment or reference
NC23	x						Made no comment or reference

Several courts made remarks such as:

It is observed that the defendant had wounds at the time he was examined, but this does not mean he was tortured or forced to testify in one way or another, especially because he denied the allegations made by the police, and taking into account also that those wounds may have resulted from his resistance to being arrested which cannot be affirmed completely, in this moment the existence of the injuries would open the possibility to a report against who produced them so the defendant has the right to do this if he desires (LMC10, p. 4).

Case LMC14 illustrates the strength of evidence provided by police, as well as alleged police mistreatment and the resulting judicial responses. The police's and defendant's accounts of the arrest and offence were radically different, including the infliction of pain. According to the police, they stopped and searched the defendant because he acted suspiciously while walking down the street in the LM's state city centre. The police found cocaine in a backpack the defendant was carrying, so he was brought to the prosecution agency. In contrast, according to the defendant, several police officers broke into his home while he was smoking marijuana with his wife and had no other drugs on him. He was asked for money to avoid being arrested. When he replied he had no money, the police beat him. After failing to obtain money from relatives, he was taken to the prosecution agency. He presented several pieces of evidence to support his case, including his wife's testimony, the judicial inspection of his home which mentioned a damaged door, the forensic report on his physical injuries and his daughter's statement that she refused to lend him money to bribe the police not to arrest him.

Despite all this evidence, the judge said there was insufficient evidence from the defence to invalidate the prosecution's case. In regard to the physical injuries, the judge stated that there was no evidence that suggested the police had caused them. The judge only mentioned that in any case the defendant had the right to press charges but all the allegations on mistreatment made by the defendant had no effect in the way evidence produced by the police was assessed.

### *Systematic bias*

Judges presume police statements and reports to be truthful and impartial, and that these were produced spontaneously. Hence, judges give police produced evidence strong evidentiary weight based on several rulings discussed above which are constantly quoted and referred to in their judgements. Also, the arguments that judges express in their decisions to explain why police statements are valid and relevant evidence are strongly influenced by those rulings as expressions and exact phrases in the judgements are almost identical to

those arguments contained in the rulings. The tendencies of granting strong evidentiary weight to police produced evidence, and to use specific rulings to sustain such a preponderant importance was also found by Pásara (2006). He pointed out that police's testimonies are not confined to being mere depositions concerning what the officer saw, but rather convert into a version of the facts (2006, p.13).

The fact that judges rely heavily on these rulings to the extent of adopting their contents provides strong indications on the way in which the judiciary visualises the police and also the way in which courts assess police evidence. Also, the fact that police statements and reports are an essential part of the indictments and subsequently of the prosecutions' cases, and that the large majority of cases result in guilty verdicts, suggest a systematic judicial bias in favour of the prosecution reinforced by rulings. At the same time, the judicial seal of approval supported by precedents extends not only to police statements but also to confidence in the probity of police actions to the extent of discarding allegations of abusive and illegal practices even when well-documented in the case file.

The extent to which judges appear to back up or favour the prosecution by taking police evidence valid almost by default seems to be unrelated to a particular context since judges decided in similar ways in both locations. Further, siding by the prosecution by upholding police and military's produced evidence seems also to be unrelated to re-enacting enemy penology –by bypassing procedural safeguards to facilitate convictions-. Instead, this tendency most likely mirrors entrenched judicial practices enhanced by rulings which facilitate convictions.

## Drugs' illicit market and violence

Only courts in the HM state made reference to the illicit market and violence in the state.<sup>188</sup> Judges stressed different arguments that described different characteristics of the illicit market which included the cost of drugs, profits from drug sales, and distribution practices. For example, in HMC14 the police stopped a vehicle whose driver attempted to abscond after a property search. In the vehicle, police found drugs (203.69 grams of marijuana in 37 packages, and 3.2 grams of cocaine in 20 packages), four mobile phones, and a list with different pseudonyms. The court held that there were many indications that demonstrated intent: the way the drug was carried, the fact that two different types of drugs

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<sup>188</sup> HMC5, HMC7\*, HMC13, HMC14, HMC16, HMC18, HMC19 and HMC22.



were present and that the quantity of drugs found indicated it was going to be distributed. The judge also maintained that the 450 pesos found on the defendant could possibly be his profits from drug sales.

In HMC7 the judge asserted that the amount of investment put into the warehouse, which was equipped with electricity and irrigation and contained many marijuana plants and fungi, could only be explained by profits from drug sales. In HMC13 the defendant faced charges for possession with intent to supply 23.5 grams of cocaine in 95 small bags. He was also found to be in possession of a firearm. According to the judge, intent to supply was supported by the fact that those involved in drug dealing tend to carry a firearm to protect the drugs or the money earned, or even to resist arrest. Similarly, the court mentioned in HMC19 that the fact that the defendant was carrying a firearm suggested it was to conceal any activities related to drug dealing.

A striking contrast was found in HMC15, where the judge made no reference to the violent context in which the offence occurred despite the fact that the media covered it widely. The events took place during the evening of May 19, 2009.<sup>189</sup> According to the soldiers who participated in the arrest, they received an anonymous call about armed people at a particular address. They went to the address and saw a person outside the house with a firearm. When the suspect saw them, he went into the premises but left the door open, which allowed the soldiers to enter. Inside, soldiers found two high-range firearms, 163 cartridges, and a quantity of methamphetamine, all of which was confiscated and brought to court, together with the suspect.

One soldier mentioned that he saw two or three people escape across the roof during the arrest. He described events to be slightly different from the version narrated above. He said he saw people escaping, so he fired his weapon at the house's fence and told the defendant to come out. The last part of his testimony raises the question of whether the defendant was chased into the house or rather forced to come out. This difference was left unexamined by the court, as was the defendant's account of the facts, which stated that he was on the premises to commit theft.

According to several media reports, there was a gunfight after the defendant was arrested; people in two vehicles shot at soldiers, leaving one of them injured (Agencias, 2009; Milenio, 2009; Plasencia, Talavera & Castro, 2009; Vélez, 2009). The people in the vehicles tried to rescue the defendant. In addition to injuring a soldier, many vehicles parked in the street were damaged by the gunfire. According to these media reports, other items found on the premises

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<sup>189</sup> The judgment was delivered on March 26, 2010.

included bullet-proof vests and a list of municipal police officers who allegedly were in the payroll of a criminal group.

Despite the fact that the gunfight appeared in many local newspapers, the court did not mention it in the judgement. The only link between the raid and the proceedings described in the judgement was the list of evidence produced by the prosecutor, which included the medical examination of one soldier taken to the army hospital (possibly the soldier who was shot), his testimony in court, several visual inspections of the house and of a car, and forensic reports on the premises.

The judgment completely ignored the circumstances of the arrest, including the fact that the defendant was about to be rescued by an armed convoy, which shot at members of the army. The judge noted that the soldiers did not produce any evidence concerning the circumstances in which the firearms and drugs were confiscated. Similarly, the judge did not address in his judgement the fact that a soldier was wounded during the arrest.

The judge found the defendant guilty of aggravated possession of drugs and illicit possession of firearms. He imposed the minimum sentence, taking into account the fact that the defendant had no previous criminal record, his age (22, according to the media), that he had limited literacy and his behaviour after the offence was committed. The judge noted that public safety and public health had been placed at risk based solely on the fact of carrying firearms and drugs but made no comment on the risk to neighbours during the shooting.

The prosecutor filed for a sentence between the medium and maximum, but this was dismissed by the court, which used the defendant's personal characteristics (age, literacy level, socio economic situation) to justify a lenient sentence. The final sentence was eight years of imprisonment which by default denied parole benefits. The judge completely ignored the possibility that the defendant was linked to a violent criminal group which shot at members of the army. Furthermore, the judge deemed the defendant not dangerous and imposed the minimum sentence possible. The refusal to link the defendant to the context in which the arrest took place raises several questions. The most pressing one is: why did the defendant, who could be framed as an 'enemy' from the enemy penology approach, receive such lenient treatment? Does this case illustrate a serious attempt to decide a case without reference to its context? Were the lack of details a strategy used by the judge to keep the judgement low-profile and thus protect himself from any possible retaliation?<sup>190</sup> It is difficult to see how

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<sup>190</sup> During an informal conversation held with a NGO member, he mentioned that HMC15 was not surprising. In fact, it was not unheard of that courts intendedly avoid mentioning any features or context of a case that could make it a high profile case for being related to organised crime. Nonetheless, this has not been fully documented.

else to explain the leniency in this case. Noteworthy are the striking contrasts between judgements: several judgements commented on the illicit market for drugs and possible violence connected to it, whereas in the one case where violence had occurred and was linked directly to the defendant, the circumstances of the case were completely ignored.

As will be discussed in Chapter 9, interviewees from the HM state, in contrast to those from the LM state, appeared less open to discuss the effects of context in decision-making as well as feeling fearful of or threatened by defendants or by the general environment of violence. This may indicate the employment of strategies to shield themselves from context, to the extent of turning a blind eye to a series of violent events clearly connected to the defendant.

## Sentencing

In the vast majority of judgements, the minimum sentence was imposed. Justification for imposing higher sentences differed between courts (five cases).<sup>191</sup> In most cases, courts granted or denied parole according to legal requirements. These included that the potential custodial sentence was less than four years or that the defendant had no previous convictions. In three cases courts determined parole based on defendants' particular characteristics such as literacy and age, or whether a defendant exhibited good behaviour before and after committing the offence.

As explained in Chapter 4, based on legal reforms passed in 2009, sentencing tariffs for drugs offences dropped between 2007 and 2012. Hence, the periods of imprisonment imposed in judgements before 2009 are higher compared to those handed down after the reform. A further result of the reform was that non-custodial sentences became available for many defendants who were sentenced for four years of imprisonment or below. Despite the fact that sentencing rules changed, the way in which courts determined punishment remained the same across judgments.

For instance, two defendants convicted for the same offence (possession of cocaine with intent to supply) received the minimum sentence but experienced the punishment differently because one was tried before the reform and the other after the reform.<sup>192</sup> The defendant who was sentenced before the reform received five years in prison, whereas the other defendant received three years.

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<sup>191</sup> HMC14, HMC22 and HMC23; LMC4 and LMC12.

<sup>192</sup> In LMC8 the defendant that carried 7.9 grams of cocaine received 5 years of prison while the defendant in LMC10 carried 10.4 grams of cocaine but was sentenced with 3 years of prison.

The reform did not only reduce the length of his sentence but allowed him to serve part of the sentence on parole. Courts imposed more severe punishment whenever this was based on specific aspects linked to the way in which the offence occurred, and to the defendant's personal factors. Also, courts imposed higher sentences in cases where the defendant committed more than one offence; these are explained below.

### *Aspects related to the offence and defendant*

When deciding the length of the sentence, courts are required to take into account several factors related to both the offence and the defendant. This includes circumstances such as the way in which the offence occurred, the harm done, and the extent of the risk it caused to society. Drug offences are held to put public health at risk and thus deemed dangerous to society, and in all cases except one the courts endorsed this argument. The defendant's personal factors include age, literacy, socio-economic circumstances, among others.<sup>193</sup>

In most cases courts used template explanations to examine the different circumstances related to how the offence happened. For example, in regard to the harm done, they argued that drug offences put public health at risk, making them dangerous by default without requiring actual harm to take place. Only in three cases the courts held that different amounts and types of drugs implied greater danger (NC14 and HMC22), and that being on the street, where drugs distribution is facilitated, put public health at greater risk (NC23). It is noteworthy that these cases did not involve the largest quantity of drugs observed in the sample; in fact in the cases above mentioned, courts imposed the minimum sentence, which confirms a general preference for low sentences.

In regard to defendants' personal factors, courts tended to describe each of these in the judgement such as mentioning the defendant's previous convictions, his exact age or his literacy background. After having described all of these factors, the judge attempted to weigh them together in order to determine the punishment. Courts concluded in almost all cases that the defendant deserved the minimum sentence.

Previous convictions were taken into account by many courts but only resulted in an increase in two cases (LMC4 and LMC12). Also, in the vast majority of judgements, courts drew attention to age and literacy. Some courts considered an adult defendant should be aware of the consequences of offending and so considered age to be an aggravating factor. Similarly, a couple of courts held that defendants' young age meant they were unable to control their impulses.

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<sup>193</sup> Articles 51 and 52 of the Federal Criminal Code.

Courts used literacy as both an aggravating and mitigating factor. For instance, the judge in LMC14 argued that society could reproach the defendant with greater justification because he had a high level of literacy (he was in the first year of high school when arrested), as opposed to those with fewer opportunities. Other courts argued that defendants' low literacy levels indicated limited opportunities to succeed in life, so society could not reproach them as harshly; other courts held that low literacy made defendants more susceptible to external influences and were easily led into commit an offence.

Some judges also took into account defendants' low income. For example, one judge pointed out that the defendant had to maintain himself and his parents with his low income and this could have influenced his decision to offend. Another aspect mentioned in some cases was the defendant's good behaviour before and after the arrest. For example, one judge felt the defendant deserved lenient treatment because he had not resisted arrest and had conducted himself well in prison during proceedings, including showing remorse.

### *More than one offence*

According to general sentencing guidelines, the final sentence is increased if more than one offence is committed. In cases where defendants faced more than one charge, they received a harsher sentence as all offences need to be considered when determining the length of the sentence. The final sentence is determined based on the most serious offence and may be increased by up to half of the other offence's sentence. In eight cases from the HM state, defendants were convicted for more than one charge; three cases<sup>194</sup> involved several drug offences and the other five<sup>195</sup> involved drugs and firearms.

For example, in HMC1 the defendant was convicted of simple possession of marijuana and for possession of a low-range firearm. The most serious offence between these two was the firearm charge which is punishable with two to seven years of prison and a fine approximately of 350 to 1,400 pesos.<sup>196</sup> In contrast, the sentencing tariff for simple possession of drugs ranged from 10 to 16 months in prison. The judge decided to increase the sentence by adding three days of prison and 70 pesos. The final sentence was 2 years, 3 days of prison and a fine of 420 pesos, being essentially the minimum punishment possible.

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<sup>194</sup> HMC14, HMC17, HMC20.

<sup>195</sup> HMC1, HMC13, v15, HMC19 and HMC21

<sup>196</sup> Sentencing guidelines, as explained in Chapter 4 determine fines based on the minimum wage. Sentencing tariffs establish how many days -50 to 200 days in this case- are multiplied by the minimum wage to calculate the fine.

In most cases judges imposed the minimum possible sentence. However, exceptions were observed in three cases where courts justified a more severe punishment based on the fact that the defendant had committed two different offences, or that the defendant put society at greater risk by carrying drugs (3.3 kg of marijuana) and a firearm.<sup>197</sup>

### *Uniformity in sentencing*

The general inclination to impose minimum sentences was a clear trend across all judgements. Several interviewees, as will be discussed in the following chapter, pointed to precedents issued by the SCJN that allow judges to impose minimum sentences without further justification, while higher sentences require wider explanation. Only a few courts quoted these precedents. In contrast to their constant referral to rulings on circumstantial evidence or police statements, the fact that judges did not refer to these rulings may suggest that they do not share them or that their contents have become part of judicial practice to the extent of being reproduced by judges.

Different hypotheses may help understand the overt preference for minimum punishment. **FIRST**, bearing in mind a managerial theory approach, it could be that courts opt for minimum punishment because it alleviates workloads, relieving judges from having to explain in detail what led them to impose a particular sentence. **SECOND**, taking into account a strategic approach, imposing minimum sentences signifies reducing opportunities for reversal, based on the highest court's precedent. Judges perhaps weigh reversals inevitably linked to career advancement, as well as managing workloads, when determining punishment in a sentence. Last, as will be discussed in the following chapter, judges seemed to be aware of current prison's deplorable living conditions in the country. Whether any of these hypothesis helps explain the tendency to impose low sentences will be examined in Chapter 8 where views on sentencing are analysed.

## Appeals

Many decisions made by low-tier courts may be challenged by the parties involved. The most common decision appealed by parties during proceedings is the intermediate resolution. As mentioned elsewhere, this resolution is issued by the trial judge within 72 hours of the indictment being filed by the pre-trial prosecutor. During this period, the court takes the defendant's initial testimony and receives any additional evidence which may be produced in that short period of time.

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<sup>197</sup> HMC17, HMC19 and HMC21.

The intermediate decision is of major relevance because it determines the course the proceedings will follow. In particular, it establishes the charge the defendant will face, which generally coincides with that filed by the prosecutor. It is possible, though rare, that judges establish one charge on the intermediate resolution and modify it when they reach a final verdict. The judge modified the charge only in one case (LMC12). In practice, the intermediate resolution anticipates the way in which the judge will decide the case because, as described in previous sections, it is the evidence produced during pre-trial that constitutes the prosecution's case. According to an interviewed magistrate, low-tier judges feel bound by their initial understanding of the case. This will be thoroughly discussed in the next chapter.

In the HM state, more than half the intermediate resolutions were challenged, while only one-third were appealed in the LM state. In the majority of cases the courts of appeals in both locations sustained the low-tier court's resolution. In the LM state, only one appeal (out of four) was granted; the appeals magistrate modified the charge from simple possession to possession with intent to supply. By comparison, in the four cases from the HM state where appeals were granted, defendants benefited, because the appeals magistrate modified the charges from aggravated possession to simple possession.

Final judgments may be appealed by both parties. In the LM state, only three judgements were challenged, while in the HM state almost half of them were appealed. Access to information on who filed the appeal and subsequent decisions made by higher courts was very limited. Nonetheless, it is interesting to see that all examined cases from the LM state ended in conviction, but only a low number of defendants appealed. One possible reading of this may be that defendants who were paroled preferred not to appeal because the effects of parole are suspended. In other words, they would have to remain remanded in custody until the appeal was decided. However, there may be many other reasons for this tendency.

## Conclusion

This chapter has set out the empirical findings based on an analysis of case file judgements. The analysis sought to compare judicial decisions on federal drug offences in HM and LM states of Mexico. The evidence suggests that the type and frequency of charges were similar in both locations. Possession with intent to supply was the most common charge, followed by simple possession. The type of drugs involved were similar: marijuana and cocaine were the most common drugs involved. An important difference observed was that greater quantities



of drugs were involved in cases from the HM state. The quantity of drugs was deemed a relevant piece of circumstantial evidence in judgements in both sites. But it was also observed that courts from the LM state were more inclined to grant quantity a decisive importance than those in the HM state, even though quantities in the LM state were much lower than those in the HM state.

The fact that quantity was not as relevant for courts in the HM state is interesting given the fact that these courts deal with more cases involving trafficking routes and large-scale drug trafficking organisations than courts in the LM state. This counterintuitive observation resonates with a magistrate's view that courts located in trafficking areas and hearing cases involving large quantities of drugs are much more lenient towards petty drug dealers. By comparison, courts located in the LM state were described by this magistrate as much more conservative and tend to see all cases as involving large-scale drug traffickers, including those concerning petty criminals carrying small quantities of drugs. This commentary was only made by one interviewee. Nonetheless it indicates the possibility that judges were affected by the ambience where the President and other high profile officials emphasised the need to address crime as a national security problem in light of the general threat to the country's and society's safety and tranquillity, in addition to seeing the military being deployed to different parts of the country to wage war on the enemy. After all, one main critique against Jakobs' model was the possible spill-over effect of enemy penology on traditional penology.

The context, in terms of patterns of crime and the degree of militarisation in the LM state and the HM state during 2006 to 2012 were strikingly different. Cases in the HM state more frequently than in the LM state involved other offences, either drugs or firearms offences, as well as the army's participation in the arrest of suspects, which reflects the differences in context. In the HM state, street shootings once a novelty too soon became commonplace, together with the increasing participation of the army in law and order activities, such as patrolling the streets and investigating crime. As these changes became part of daily life society—including judges<sup>198</sup>—was forced to adapt. By comparison, the LM state experienced few changes, crime rates remained constant and the military rarely participated in public safety matters.

The HM state's context showed subtle effects on the cases examined, as described in judgements. The first effect was the involvement of the army in the arrest of suspects. Many of these arrests took place at checkpoints established

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<sup>198</sup> An interviewed magistrate explained how he had encountered two street shootings and how he was managing fear and anxiety with his family.

across the state by soldiers, after conducting property searches or as a result of their patrolling the streets. The second aspect was the quantity of drugs involved, because cases in the HM state involved greater quantities than those in the LM state; the case of raiding the marijuana warehouse is most illustrative. The third touched on the fact that many suspects in the HM state were apprehended with firearms in their possession which, according to several judges, were used by criminals to protect the criminals themselves as well as their profits from drug sales.

The differences in context naturally influenced the circumstances of the cases. However, judicial decision-making did not mirror these differences, either in conviction rates or sentencing. Judges' explanations of their reasoning process and the legal arguments stressed remained similar in both case study locations. Perhaps the greatest difference, found only in a few judgements from the HM state, as where courts argued that the way in which the illicit drugs market operated helped to prove the offence. Case HMC15 illustrates the extreme of these observations. On the one hand, the level of insecurity and violence experienced in the HM state was exemplified by the shooting that took place between a criminal group and members of the military where a soldier was wounded in an attempt to rescue the suspect. On the other hand, the court's deliberation process was not affected by this to the extent of imposing minimum punishment because the court did not consider the defendant to be dangerous.

On the whole, there is little evidence from the case judgements that 'enemy penology' has shaped judicial decision-making in Mexico. The working hypothesis was that the context in the HM state would be an arena where an enemy penology model would flourish, given the violence and insecurity, paired to the militarisation of crime control activities and the subsequent abrupt changes in social life. Yet within the warlike context of that state, judicial decision-making appeared to be very similar to that in the relatively peaceful environment of the LM state. The conclusion drawn is that judicial decision-making has been not been affected by the militarisation that has occurred in the broader context. This conclusion is based on several indications: **FIRST**, offenders appeared to be treated equally in both locations, as opposed to courts in the HM state treating defendants as enemies and thus in a more severe manner. **SECOND**, it was observed that procedural safeguards were similarly applied, and these safeguards were not reduced to facilitate convictions for more serious offences or in the HM state. **THIRD**, lenient sentences – based on sentencing guidelines – were a common practice in both locations, so it was not found that defendants were punished disproportionately aiming at their

elimination. Therefore, one of the main findings of this research is that, contrary to expectations, the enemy penology paradigm clearly present in the statements of government officials was not reproduced by courts, both located in the HM state and in the LM state.

Judgments from the HM and the LM states appeared to be consistent and uniform. As one interviewee put it, “Judges are cut with the same scissors”<sup>199</sup> They are trained in the same academy and provided with practical tools to draw during proceedings (Guerrero, 2008). For instance, judgements are organised and constructed in similar ways. Circumstantial and police evidence are weighed equally, which tends to guide judges to similar verdicts. In addition, sentencing practices were also found to be homogenous.

More importantly, the constant referral to and citation of specific rulings in judgements in both locations suggests that this homogeneity stems from these rulings. This claim is reinforced by the fact that courts frequently use arguments and even some simple expressions embedded in these rulings and present them as their own. Also, the use of ‘templates’ promoted by high-ranking magistrates enhances uniformity in judgements and downplay any sort of creative reasonings. As Guarneri, Pederzoli, and Thomas (2002) argue, lower courts are controlled and assessed by higher courts in a permanent basis which on one hand reduces judicial discretion, while on the other fosters uniformity. Ultimately, to disregard a binding ruling issued by the Supreme Court would no doubt get judges into trouble.<sup>200</sup> It is interesting to note that many of the quoted and referred rulings by judges are not authoritative and are even outdated. As Posner (2008) and Lindquist & Cross (2005) mention, particular precedents may become part of the legal fabric to the extent of being repeatedly referred to even if they are not authoritative or are inherently wrong.

At the same time, the effort to draft judgements casting aside the context—including a gunfight between a criminal group and the army, a violent and threatening environment, public officials urging to wage war on delinquency, among others—mirror a legalistic ethos. Judicial behaviour, explained within a legalistic model holds that judges apply the law and precedents accurately to the case in hand while unattached from many other factors, including the President’s criminal justice policy of declaring the war on organised crime embedding an enemy penology model. Essentially, the judiciary in the two locations examined did not take into account the general environment in their judge-

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<sup>199</sup> According to an interviewed magistrate in the HM state. November 2012. The equivalent saying in English would be ‘judges are cut from the same cloth’.

<sup>200</sup> HM first instance judge 2.

ments with exception of a few of them from the HM state which mentioned the drugs' illicit market. The insulation from the context, including from politics, appears to be achieved through the use of templates and the constant referrals to rulings which at the same time enhance the judiciary's independence from the government's criminal justice policies.

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## Judicial voices on understanding the defendant, presumption of innocence and sentencing

### Introduction

As discussed earlier in this thesis, there has been some concern in recent years that the Mexican criminal justice system has become more militarised. The rise of drug violence and other violent crime, the increasing use of battlefield weapons by criminal groups together with the involvement of the military in crime control have all placed pressure on the system. In addition, high-profile officials, including the president, have publicly stated that criminals, or particular members of criminal groups, are Mexico's enemies; they deserve no tolerance but rather need to be eliminated.<sup>201</sup> The overall questions are: to what extent are judges expressing views akin to an enemy penology paradigm? Can any difference be traced between judges' views located in the HM state and LM state? One key question for this thesis, therefore, is to what extent judges and magistrates think of offenders as dangerous or even 'enemies' to society, people who deserve segregation or even elimination from society, as the president claimed. A second key question was whether judges perceived or said that procedural safeguards were restricted when trying defendants or they being upheld with greater rigour, and to what extent. A third key question pursued was whether and to what extent judges embraced the elimination sentencing goal.

In regard to the first key question, slight indications of enemy penology treatment were only found in the LM state, where it was thought a certain type of offender should be treated with a separate set of rules, or that the president's discourse had expanded the label of large-scale drug trafficker to include minor drug offenders. Only judges from that location distinguished ordinary offenders from dangerous and highly organised ones. Conversely, only one interviewee in

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<sup>201</sup> Public statements made by high-profile officials are examined in detail in the section 'warfare and enemies' in Chapter 3.

the HM state described defendants as enemies.<sup>202</sup> This alone, however, is not sufficient to suggest that judges see some defendants as enemies and that therefore an enemy penology paradigm is not reproduced by the judiciary. Also, there was no significant difference found across locations in how defendants are seen.

Concerning the second key issue, judges addressed the question of whether defendants are presumed innocent during proceedings in various ways. This appeared to be unrelated to the enemy penology model promoted by the government and the so-called war on organised crime. Rather, ineffective presumption of innocence was described as being linked to judicial practices and rules, as well as concerns about impunity and unpopular judicial decisions. Only one interviewee presumed all drug dealers to be high-profile drug traffickers due to the government's criminal policy.<sup>203</sup>

At the same time, no link could be found between interviewees' locations and their views on presumption of innocence. Some judges from both the LM and the HM states agreed that this principle is fully enforced, while other interviewees from both places said it was ineffective. There was significant disagreement, however, about what hampers its enforcement.

The discussion on the third key issue, sentencing, was mostly homogenous across locations and interviewees. Only a single judge<sup>204</sup> voiced the desire to eliminate offenders, similar to what enemy penology prescribes for enemies, hence the elimination ideal was found almost nowhere. The great majority of interviewees from both locations held that sentencing should focus on the defendant's rehabilitation and reintegration into society, allowing him or her to gather supportive tools and training in prison. Judges from both locations mentioned that the defendant's personal characteristics were relevant. At the same time, the vast majority of interviewees from both locations claimed that the way in which the offence had taken place was very significant. In sum, no difference was found between the HM and the LM state judges concerning sentencing.

Judges' views and accounts on these issues are described in detail below. Throughout this and the next chapter, it is important to bear in mind several issues discussed in previous chapters including: the structure of the courts (chapter 4), the different models that help explain judicial decision-making and the different judicial purposive and decision-making roles (chapter 5) and the political and social context of both the states examined in this thesis (chapter 6). At the same time, several methodological themes need to be considered,

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<sup>202</sup> HM magistrate 1.

<sup>203</sup> LM magistrate 4.

<sup>204</sup> HM magistrate 1.

such as the way in which opinions are presented by interviewees, past experiences of judges in the different locations, and the fact that their accounts may result from being in contact, to some degree, with local politicians and legal practitioners (chapter 6). Judges' comments on military involvement in court proceedings and judicial independence are examined in Chapter 9.

## Conceptualising the offender

The initial question<sup>205</sup> I asked was: "how do you conceptualise or think about the defendant when he is brought to court?" Judges mainly engaged with this question from two different angles: defendants' personal characteristics and defendants within the setting of criminal proceedings.

### *Personal characteristics*

Some judges from the LM state agreed that defendants are pushed into criminal activity because they lacked basic needs and care. Defendants were seen as ordinary people who may have offended.<sup>206</sup> Some interviewees agreed that defendants were not evil people,<sup>207</sup> and that most of them came from vulnerable backgrounds, where a lack of opportunities could foster the propensity to offend.<sup>208</sup>

Similarly, interviewees from the HM state held the view that defendants were human beings and ordinary people, not despicable beings just because they have been charged and brought to court. An interviewee described how he conceptualised the defendant based on the offence he or she was charged with. In his view, it is society itself that produces offenders who in turn put society at risk; criminality has increased because of social inequality and the lack of opportunities for young people.

A judge from the HM state also thought the need to take the defendant's personality into account was relevant. He noted that defendants are human, and one has to analyse aspects related to their personality, education, and the way in which they participated in the offence.<sup>209</sup>

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<sup>205</sup> The interview schedule is contained in Appendix 1.

<sup>206</sup> LM first instance judge 5, LM first instance judge 7, LM first instance judge 2, LM first instance judge 3, LM appeals magistrate 1, LM appeals magistrate 2, LM magistrate 2, LM magistrate 3.

<sup>207</sup> LM appeals magistrate 1.

<sup>208</sup> LM first instance judge 5, LM first instance judge 2, LM first instance judge 3, LM appeals magistrate 2, LM magistrate 3, LM magistrate 5.

<sup>209</sup> HM appeals magistrate.



Several interviewees pointed out that criminals have changed; for example, offenders used to fear authority but now they fire back at it.<sup>210</sup> As one interviewee put it: “Now they have no values, no ideology... now they are more sadistic, more savage... now they are full of vices, full of excesses”.<sup>211</sup>

### *Defendants within a criminal proceedings setting*

Conceiving the defendant based on criminal proceedings was widespread. Interviewees from the LM state mentioned that their understanding of the defendant relied solely on the case file,<sup>212</sup> or at least, that ought to be what happened.<sup>213</sup> According to an interviewee from the HM state, the nature of the offence and the general delinquency situation determines whether the defendant is thought of as an enemy or a danger to society rather than making this assessment on the basis of the defendant’s individual characteristics.<sup>214</sup> A judge from the LM state noted that despite a defendant’s vulnerable background, judges had to apply the law, which meant prosecuting the defendant and sentencing him if found guilty.<sup>215</sup>

Several interviewees said that their assessment of the defendant depended on the charges he faced, whether he was a recidivist, and the way in which the offence was committed.<sup>216</sup> A peasant with a shotgun carrying a couple of rabbits faced the charge of carrying a firearm without a licence; yet that same charge was pressed against another defendant who was also involved in kidnapping and shooting at the police. Although the criminal offence was the same, the different circumstances led the judge to develop a specific conceptualisation of each defendant.<sup>217</sup> “All the data contained in the case file led me to have an idea of the defendant, either as a danger to society or as a victim.”<sup>218</sup>

While this judge’s understanding was derived directly from the case file, another interviewee said that meeting defendants and observing them during court proceedings helped him to build an idea of them. For instance, he men-

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<sup>210</sup> LM magistrate 5, LM magistrate 1, LM magistrate 2, LM magistrate 4, LM first instance judge 2.

<sup>211</sup> LM magistrate 2.

<sup>212</sup> LM appeals magistrate 1, LM first instance judge 7.

<sup>213</sup> LM first instance judge 2.

<sup>214</sup> HM magistrate 5.

<sup>215</sup> LM appeals magistrate 2.

<sup>216</sup> LM first instance judge 7, LM appeals magistrate 2.

<sup>217</sup> LM first instance judge 7.

<sup>218</sup> LM first instance judge 7.

tioned that he got a sense of who might be lying based on the way the defendant looked at him, either with a defiant glance or evading eye contact.<sup>219</sup>

By comparison, judges from the HM state described the defendant as someone innocent until proven guilty<sup>220</sup> or someone who cannot be conceptualised as a criminal despite the fact that people already see him as guilty because he is being tried.<sup>221</sup> Defendants are, according to another judge, victims of the legal system, because once they are brought to court they face the burden of incriminating evidence.<sup>222</sup> The defendant's disadvantage may be exacerbated by the prosecution's inefficient investigation and the increasingly violent environment.<sup>223</sup> "The defendant tries to fight the evidence produced against him during the whole proceedings with very low possibilities [of winning]".<sup>224</sup>

Interviewees from the HM state described the ways in which defendants face proceedings from a disadvantaged position.<sup>225</sup> According to one, this disadvantage consists not only of incriminating evidence but also the fact that the court's final verdict is strongly shaped by its initial impression of the case, contained in the intermediate resolution, before the trial actually begins. He held that this is not merely an inclination to rule against the defendant but rather the result of procedural rules such as the evidence principle of immediacy, which subtly push the judge to convict. In practice, he said, the first evidence collected is the police version of the facts, so this evidence is given greater weight than any produced by the defendant during trial.<sup>226</sup>

According to this interviewee, most intermediate resolutions are based on evidence produced during pre-trial and conclude that the defendant is guilty; this tends to be reflected in the final verdict.<sup>227</sup> Accordingly, judges who change their mind during trial are seen negatively for contradicting their own assessment of the case, so most of them maintain their initial judgment until the final guilty verdict.<sup>228</sup>

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<sup>219</sup> LM first instance judge 3.

<sup>220</sup> HM first instance judge 2.

<sup>221</sup> HM magistrate 3.

<sup>222</sup> HM magistrate 4.

<sup>223</sup> HM first instance judge 1.

<sup>224</sup> HM magistrate 4.

<sup>225</sup> HM magistrate 4, HM first instance judge 1.

<sup>226</sup> HM magistrate 4.

<sup>227</sup> HM magistrate 4.

<sup>228</sup> HM magistrate 4.

Interviewees from the HM state agreed that first instance judges tend to conceptualise defendants in a biased or unfavourable manner.<sup>229</sup> “There are judges who from the moment defendants are brought to court consider them guilty”.<sup>230</sup>

It would appear from these accounts that upholding the defendant’s innocence at the beginning of proceedings is difficult if not impossible. This may be due to current procedural rules and to incentives that pressure judges to maintain their initial understanding of the case, which tends to be against the defendant. Or, as another interviewee held, judges are pressured by deadlines, media and the parties involved to the extent that issuing a guilty verdict is safer.<sup>231</sup> Be that as it may, several accounts discussed the limited scope of the presumption of innocence in practice and what could explain its ineffectiveness.

### *Defendants as enemies*

The judges who made comments that framed defendants as enemies were mainly from the LM state but were often referring to experience gained elsewhere. These interviewees distinguished between ordinary criminals and a particular type of offender, described as dangerous, threatening or highly organised.<sup>232</sup> For instance, members of drug-trafficking organisations were described as appearing like normal people while being high-profile criminals: “They seem to have a double life”.<sup>233</sup> These defendants, according to this judge, are not impulsive, will not rob for small amounts of money, are difficult to trick, tend to understand proceedings and are well educated. In consequence, the way to conceptualise them has to be different from the ways used to conceptualise the majority of defendants, who are low-profile criminals.

Another judge held that perhaps defendants were not seen as enemies but, based on the way they committed the offence and the way they were arrested, their dangerousness was noticed so an idea begins to build in the judge’s mind.<sup>234</sup> In regard to defendants charged for organised crime offences or for being members of a criminal organisation, another judge held:

[They] are a danger to society, they rule as if they were in a parallel state, hence to face them the use of force is needed. However, trying them is

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<sup>229</sup> HM magistrate 4, HM magistrate 5, HM first instance judge 1.

<sup>230</sup> First instance judge 1.

<sup>231</sup> HM magistrate 5.

<sup>232</sup> LM first instance judge 2, LM first instance judge 6, LM first instance judge 3, LM appeals magistrate 2, HM magistrate 1.

<sup>233</sup> LM first instance judge 2.

<sup>234</sup> LM first instance judge 3.

difficult because basic safeguards, such as the right to a defence or having the prosecutor produce sufficient evidence, are not enforced, leaving them unprotected.<sup>235</sup>

Another judge reacted to criminal organisations who were falsifying judicial warrants and using them to extort and kidnap victims in the following terms:

We need a specific way to try organised crime...to those people, different rules should indeed be applied, those who act in groups and are part of organised crime.<sup>236</sup>

Interviewees agreed that dangerous offenders should be treated differently, either with a separate set of procedural rules or sent to specific prison facilities to ensure the community's safety.<sup>237</sup> One interviewee mentioned that even violent or dangerous offenders lacked basic necessities and care, the absence of which helped explain their behaviour.<sup>238</sup>

An interviewee from the HM state pointed out that minor drug dealers may not be dangerous by comparison with other offenders, such as hired assassins, who do not deserve lenient treatment because they are a danger to society. According to this judge, some offenders have no ethical values, no morals, and show disdain for life because of the ways in which they kill, kidnap and harm for no other purpose than obtaining money.<sup>239</sup>

They are people who show disdain for life, leaving a feeling of 'what are these people doing here? How can they be rehabilitated?' They ought to be kicked out of society because society is in danger. Sometimes you think, those 'hired assassins who kill for a living should better be outside society'.<sup>240</sup>

The view that defendants should be excluded from society was a great contrast to the views of the vast majority of the judges I interviewed. It may be simply an exception, an extraordinary way of thinking about defendants. However, it may also be the case that this judge was expressing a genuine reaction towards naked violence, trying to find a way of coping with a changing reality, while rejecting the dutiful "ought to" tone.

Whether judges treat defendants differently based on their understanding or perception of dangerousness cannot be known for certain, particularly after

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<sup>235</sup> LM magistrate 2.

<sup>236</sup> LM first instance judge 6.

<sup>237</sup> LM first instance judge 1, LM first instance judge 6, LM magistrate 5.

<sup>238</sup> LM first instance judge 5.

<sup>239</sup> HM appeals magistrate.

<sup>240</sup> HM appeals magistrate.

examining judgements. A few indications were found in interviews, but overall judges appeared not to hold an enemy penology view in either locations. The idea that some types of offenders deserve to be tried using special legislation resonates with the enemy penology paradigm, which advocates for applying an exceptional legal regime to enemies. It is noteworthy that only a single interviewee from the HM state talked about particular types of dangerous offenders. He did not suggest they deserved to be treated with a separate set of rules but rather that they should be excluded from society.

## Presumption of innocence

The second theme discussed was presumption of innocence, understood in this thesis as a yardstick to measure effective procedural safeguards in trial. Hence, I asked interviewees: “is the principle of presumption of innocence applied effectively during court proceedings?” In general terms, judges’ opinions about the presumption of innocence fell into three groups. The first group articulated the formal, official, institutional discourse that defendants are indeed presumed innocent. In the second group, judges acknowledged that the principle was partially enforced, while the third group included opinions about the lack of enforcement of this principle. The discussion of presumption of innocence touched upon different themes, such as concerns about impunity, the effect of the press, the judiciary’s self-perception, its awareness of the judiciary’s social acceptance and the divide within the judiciary about the reforms on due process and adversarialism. Also, judges talked about related topics throughout the conversation including prosecution, evidence and custodial remand.

### *Formally, defendants are presumed innocent*

Interviewees from both locations answered that presumption of innocence formally exists in the legal system.<sup>241</sup> They pointed out that the SCJN has issued several binding rulings stating that presumption of innocence is contained in various constitutional articles. For example, the fact that the government has to comply with several requirements to justify a suspect’s arrest shows that the government has the burden of proof and that suspects are initially presumed innocent.<sup>242</sup> Further, in 2008, this principle was explicitly inserted into the Constitution, so it is false to maintain that defendants must prove their innocence.

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<sup>241</sup> HM magistrate 2, HM magistrate 4, HM magistrate 5, HM appeals magistrate, LM appeals magistrate 1, LM appeals magistrate 2, LM magistrate 5.

<sup>242</sup> HM magistrate 4.

*Presumption of innocence is effectively applied*

Interviewees in both states explained that the principle of presumption of innocence is enforced at the moment in which the court examines evidence, whether the defendant is in custodial remand or released on bail. Presumption of innocence means that the defendant has the opportunity to produce evidence to be analysed by the judge.<sup>243</sup> Ultimately, verdicts must rely on the evidentiary material contained in the case file.<sup>244</sup> If the state failed to produce evidence and prove its case, defendants are released, thus the presumption of innocence upheld.<sup>245</sup>

Judges from the LM state highlighted that presumption of innocence is effectively applied, even though this may imply that in some cases victims are left completely defenceless because the prosecutor failed to present a solid case.<sup>246</sup> For instance, a judge from the LM state described a case in which he had to acquit a defendant of a prostitution charge even though there was sufficient evidence, including a list of clients, inspection of the rooms where the sexual services were provided, contraceptives and witness statements. The evidence, though compelling, had resulted from an illegal property search, so all of it was nullified.

We recognise that there is a lot of prostitution and exploitation of minors, but the prosecutor's absurd and illegal way of conducting himself forced me to decide in that direction.<sup>247</sup>

Another judge from the HM state explained that in his experience, constitutional protection or amparo was granted to defendants based on insufficient incriminating evidence. This showed that the principle of presumption of innocence was effectively applied.<sup>248</sup> "The presumption of innocence prevails because the evidentiary material produced by the prosecution may be insufficient to find [the defendant] guilty".<sup>249</sup>

From the accounts above it would appear that defendants are presumed innocent during trial, because evidence is examined by the court and the verdict is then reached. However, bearing in mind that the ratio of convictions to acquittals is nine to one, questions arise concerning the effective application of this principle.

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<sup>243</sup> LM magistrate 5. HM first instance judge 1.

<sup>244</sup> LM first instance judge 7.

<sup>245</sup> HM first instance judge 2. LM first instance judge 4, LM first instance judge 1, LM first instance judge 2, LM first instance judge 7, LM magistrate 5.

<sup>246</sup> LM first instance judge 1, LM first instance judge 7.

<sup>247</sup> LM first instance judge 7.

<sup>248</sup> HM magistrate 5.

<sup>249</sup> HM appeals magistrate.

A different interviewee from the LM state pointed out that the relevant issue was that the defendant must not be treated as criminally responsible during the trial, even though he was probably guilty, given the initial incriminatory evidence produced against him.<sup>250</sup> The effort to remain impartial until the final verdict was described by another judge from the HM state in the following terms:

One must not decide beforehand, one does not have certainty that an offence was committed or that a sentence must be imposed until the verdict. Bearing this in mind helps one to see and understand the facts of the case with impartiality. There might be cases where one feels anger but no, one must preserve impartiality.<sup>251</sup>

From the above comment it would appear an effort is made to presume the defendant innocent despite incriminatory evidence. This sheds light on the current habit of presuming defendants guilty embedded in the legal framework. It also reveals a more realistic approach to judicial decision-making in cases where a vast amount of information suggests someone is guilty.

*In practice, presumption of innocence is not applied*

Interviewees from both states said that defendants were not presumed innocent during trial.<sup>252</sup> Some agreed that in practice defendants have to prove their innocence,<sup>253</sup> or that they cannot be presented as innocent before the court because they carry into the trial the burden of incriminatory evidence produced by the prosecutor during pre-trial.<sup>254</sup>

According to an interviewee from the HM state, when a defendant is brought before a judge with sufficient incriminatory evidence produced during the pre-trial phase, the defendant is already seen as potentially guilty. The legal system is geared to giving the defence barely any chance to produce evidence right from the start of pre-trial, so in practice, the defence only can controvert the evidence produced during pre-trial and present new evidence to prove the defendant's innocence. According to this interviewee, the system makes it difficult to see the defendant as innocent and treats him as guilty from the outset; he is, after all, already facing a large amount of evidence against him.<sup>255</sup> At times, the initial

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<sup>250</sup> LM magistrate 5.

<sup>251</sup> HM magistrate 3.

<sup>252</sup> HM magistrate 4, HM appeals magistrate.

<sup>253</sup> HM magistrate 1, HM magistrate 4, HM appeals magistrate, HM magistrate 4, HM appeals magistrate.

<sup>254</sup> LM first instance judge 7.

<sup>255</sup> HM magistrate 4.



evidence produced by the prosecutor suffices to issue a guilty verdict.<sup>256</sup>

Judgements analysed from both locations corroborate this last account. It was consistently found that the prosecutor hardly produced any evidence during court proceedings, and the evidence produced during the pre-trial stage was used by the judge to reach a verdict.

According to interviewees from the LM state, binding rulings instruct judges to shift the burden of proof from the prosecution to the defence, which facilitates convictions. For example, according to case law, the defendant must demonstrate having no prior knowledge of the drug he was caught with.<sup>257</sup> A judge described a case in which a truck driver was asked to prove he did not know the drugs were in his truck. He was stopped by the police on the highway, and after seeing the trunk was sealed with silicon they scanned it and found cocaine. Once the truck driver realised this, he tried to run away. The prosecutor's case relied solely on the fact that the driver tried to escape, which showed he feared something and consequently knew about the drugs. In the judge's view, inferring prior knowledge from the fact that the driver ran away was far from solid evidence, but even though he knew he had insufficient evidence, he convicted the defendant relying on the binding ruling explained above.<sup>258</sup>

Judges from the LM state mentioned that the defendant has to prove his innocence, although they approached this claim from different perspectives.<sup>259</sup> One interviewee claimed that legally binding rulings establish that the defendant should prove his allegations, aiming to relieve the prosecutor from proving his case beyond reasonable doubt.<sup>260</sup> A judge described as dangerous the practice of not following binding rulings issued by the scjn.<sup>261</sup> Others maintained that defendants often contradicted police testimony but failed to prove their allegations, especially about the way in which they were arrested.<sup>262</sup> Claiming that defendants are compelled to prove their version of the facts implies that the police's version is taken as valid and that defendants are far from being presumed innocent from the outset. Interviewees held that judges tend to privilege police statements even when, in their view, they no longer deserved as much

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<sup>256</sup> LM first instance judge 7.

<sup>257</sup> LM first instance judge 5, LM magistrate 4.

<sup>258</sup> LM first instance judge 5.

<sup>259</sup> LM magistrate 4, LM magistrate 2, LM first instance judge 5, LM first instance judge 7.

<sup>260</sup> LM magistrate 4.

<sup>261</sup> HM first instance judge 2.

<sup>262</sup> LM first instance judge 7, LM appeals magistrate 1.

credibility<sup>263</sup> and that Mexican judges tend to be stricter on the defence than on the prosecution.<sup>264</sup>

These commentaries are particularly interesting in the light of the fact that, in many of the judgements analysed, defendants contradicted the police's version of the facts relating to how they were arrested and to how the offence took place. The propensity to give law enforcement agents greater credibility casts doubt on the effectiveness of the equality of arms principle in proceedings and illustrates the disadvantages defendants face in criminal proceedings.

The chance of rearresting a defendant who had been found innocent was relevant to interviewees in the LM state.<sup>265</sup> A judge held that he preferred the appeals magistrate to acquit the defendant rather than acquitting the defendant himself and subsequently facing a reversal that would be difficult to enforce.<sup>266</sup> It would be equally difficult to trace and rearrest an acquitted defendant if the upper court found him guilty and overturned the acquittal.<sup>267</sup> In this judge's view, if the procedure were different (i.e. if the defendant were released from custodial remand until the appeal was decided), many more defendants would be acquitted.<sup>268</sup>

Another interviewee from the HM state, describing his initial experience as a low-tier judge, said: "I acknowledge too that in my first years I had an initial unfavourable view of the defendant, but years make you evolve". He explained that the defendant had several legal remedies: "Well, he can appeal...".<sup>269</sup>

From these commentaries, it would seem that the fact that defendants have the chance to have a higher court overturn a guilty verdict balances the possibility of being wrongfully convicted by a lower court. It would even appear that the harm caused by a possible wrongful conviction is minimised by the fact that defendants still have a chance of being acquitted by a higher court, described in terms of: "Sorry for the inconvenience".<sup>270</sup>

A judge from the LM state addressed presumption of innocence together

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<sup>263</sup> LM first instance judge 2.

<sup>264</sup> LM magistrate 2.

<sup>265</sup> LM first instance judge 5, LM first instance judge 7.

<sup>266</sup> LM first instance judge 5.

<sup>267</sup> LM first instance judge 5, LM first instance judge 7.

<sup>268</sup> LM first instance judge 5.

<sup>269</sup> HM magistrate 5.

<sup>270</sup> HM magistrate 5.

with policies concerning deterrence.<sup>271</sup> Accordingly, judges seek to deter particular types of conduct by presuming defendants guilty and remanding them in custody. In this commentary, the judge described custodial remand as a form of incapacitation prior to trial proceedings. This resonates with enemy penology's pre-emptive approach, in which proceedings follow once the suspect has been detained.<sup>272</sup>

Another interviewee confirmed that 'presumption of guilt' is still assumed by some members of the judiciary where defendants are initially deemed responsible for an offence because they were indicted, granting the prosecution greater credibility from the start.<sup>273</sup> For example, he mentioned:

There are magistrates whose position is to punish, who have the view that if they [defendants] have been brought to court it is because they really have committed an offence.<sup>274</sup>

In this judge's experience, upholding presumption of innocence based on international human rights treaties (before the presumption was embedded in the Constitution) led to dismissals by higher courts, which maintained that these arguments lacked any legal basis and were plainly subjective.<sup>275</sup>

The lack of enforcement of this principle is deeply rooted in the Mexican legal tradition and judicial decision-making, said one interviewee from the LM state.<sup>276</sup> The transition towards adversarialism has forced upon judges a new way of weighing evidence and deciding cases, but judges are simply not used to applying the presumption of innocence principle.<sup>277</sup> Some believe that presumption of innocence will be enforced once the adversarial system is applied.<sup>278</sup> Another judge from the HM state summed this up:

All that is said by the prosecutor during the pre-trial stage is sufficient to dictate a guilty intermediate resolution and even a guilty verdict with the same evidence... this will change with the new system, in which we will have to presume the innocence of the defendant...<sup>279</sup>

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<sup>271</sup> LM appeals magistrate 1.

<sup>272</sup> LM appeals magistrate 1.

<sup>273</sup> LM first instance judge 2.

<sup>274</sup> LM first instance judge 2.

<sup>275</sup> LM first instance judge 1.

<sup>276</sup> LM appeals magistrate 2.

<sup>277</sup> LM first instance judge 5.

<sup>278</sup> LM appeals magistrate 2.

<sup>279</sup> HM appeals magistrate.

The role of the judge, according to an interviewee, is to reconstruct the truth or at least come as near as possible to discovering what really happened.<sup>280</sup> The inquisitorial role of judges as truth seekers is mirrored in this commentary and links back to the common practice of supplementing insufficient evidentiary material. It also appeared that a judge's need to establish the legal truth is reason enough to step into the prosecutor's shoes and ameliorate the lack of evidence and/or rigour of the prosecution's case.

The changing role of judges in light of the so-called human rights constitutional reform established in June 2011 was mentioned by interviewees in both locations. Based on the changes made to the Constitution and a ruling issued by the SCJN, judges are now expected to consider human rights issues and rely on human rights law. According to one interviewee: "We have to protect human rights to comply with our judicial role".<sup>281</sup> According to another: "Judges will live another era as the human rights paradigm challenges the notion of being limited to applying the letter of the law and instead allows them to act as freer interpreters".<sup>282</sup> A third interviewee said:

There are differences within the judiciary. It is important to bear in mind that we need to enforce human rights. Judges need to realise that we need to stop being accomplices of the denial of justice.<sup>283</sup>

From these accounts, judges seemed to see themselves as ritualists and law-interpreters, their duties limited to applying the law to a case. Interestingly, the reform that authorises judges to disregard legislation that contravenes human rights was meant to liberate judges from legislation and become free interpreters, which currently they are not. Also, linking judges' current role to a denial of justice highlights that to the judge quoted above, applying the law accurately while disregarding, for instance, a sense of justice, common sense, ideology or policy goals, results in unfairness.

The extent to which judges' performance will change alongside their roles is still unclear. The hierarchical structure of the Mexican federal judiciary paired with the control that higher courts exert over lower courts suggest that changes will happen to the extent that the upper courts agree with these changes. Interviewees mentioned that judges are attentive to reversals and to coinciding rulings from upper courts when deciding a case. This indicates ways in which higher courts exert control over lower ones and shape their judgements. Inter-

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<sup>280</sup> LM magistrate 1.

<sup>281</sup> HM first instance judge 1.

<sup>282</sup> LM appeals magistrate 2.

<sup>283</sup> LM first instance judge 1.

viewees, particularly low-tier judges from the LM state, commented on the relevance of the way in which the appeals and constitutional magistrates decide.<sup>284</sup> For example, interviewees noted that they explained their arguments as clearly and persuasively as possible so that upper courts would be convinced by their decisions and consequently ratify their judgements.<sup>285</sup> “I try to step into the shoes of those who may overturn the judgement; I look for weak points and try to strengthen them”.<sup>286</sup>

Also, reversals hamper career advancement, particularly in cases where uniformity, continuity and legal certainty are enhanced institutional values but creative and innovative legal interpretations are not welcome. Ultimately, reversals, according to Baum, are seen as signs of poor judging (2006, p.111), so the issue of whether upper courts will confirm or overturn trial courts’ decisions is openly considered by judges when issuing a judgement.

As described in the Introduction, the transition from a quasi-inquisitorial system to an adversarial one demands a profound transformation in rules and practices. Whether the change in rules will bring a change in behaviour, particularly judicial behaviour, is difficult to predict. Most of the time during interviews, discussing the new criminal justice system seemed a way to deflect attention from current issues such as the quality of evidence produced by prosecutors, which was barely mentioned.<sup>287</sup>

The enemy penology paradigm, mirrored in the link between the war on organised crime and the effective enforcement of presumption of innocence, was traced only in one commentary. A judge from the LM state held:

The existence of words such as drug offence or organised crime are sufficient to make the judge and the prosecutor be predisposed [to treating all defendants as drug traffickers or as linked to organised crime] and assert that this person poses great danger; we are setting the principle of presumption of innocence aside... this conceptualisation or stigmatisation based on the fact that the offence was committed, disregarding the defendant’s participation, is indeed present, and it is ruining the principle of presumption of innocence, because we are predisposed to expect somebody to be dangerous and to punish him accordingly.<sup>288</sup>

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<sup>284</sup> LM first instance judge 7, LM first instance judge 1, LM first instance judge 2, LM first instance judge 3, HM first instance judge 1.

<sup>285</sup> LM first instance judge 1, LM first instance judge 3.

<sup>286</sup> LM first instance judge 3.

<sup>287</sup> HM magistrate 1, HM magistrate 2 and HM appeals magistrate.

<sup>288</sup> LM magistrate 4.

This commentary was an exception, however, so it can be held that the enemy penology trait of reducing defendants' procedural rights in trial was not widely found. At the same time, the commentary points out the difficulty of presuming someone innocent in a context where violent criminal groups and drug-trafficking organisations operate on such a wide scale that they jeopardise the state's stability.

*Press, public opinion, impunity and unpopular acquittals*

Interviewees, mostly from the LM state, mentioned the difficulties judges face in declaring someone innocent once the press has portrayed them as guilty.<sup>289</sup> According to a judge, prosecutors sometimes deliberately bring flawed investigations before the court to force the judge to be the one to release the defendant, rather than the prosecutor.<sup>290</sup> Another judge mentioned that in high-profile cases, such as drug trafficking, even if there is insufficient evidence, more than one judge would hesitate to declare a defendant not guilty.<sup>291</sup> "Many times we may think that if we acquit due to insufficient evidence, we might be sending negative signs".<sup>292</sup>

At times they [dangerous offenders] are released because there is no evidence and society does not understand, does not distinguish between the prosecutor's duty to investigate and indict and the judge's; if a defendant is released, it is because the judge is corrupt.<sup>293</sup>

The perception that judges are aware of their lack of public support is confirmed by Begné Guerra, who also found that the judiciary desire greater social acceptance and credibility (2007, p. 93). The confusion about the roles played by the prosecutor and the judge, together with the press depicting defendants who are still facing proceedings as already guilty, contributes to social mistrust (Begné Guerra, 2007; Concha Cantú & Caballero Juárez, 2001). As an interviewee pointed out, people do not understand because they are misled by the press who portray defendants as already guilty. He tried a case in which a defendant could not return to his community because people there still believed he was guilty even though he was acquitted.<sup>294</sup>

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<sup>289</sup> LM magistrate 1, LM first instance judge 5, LM first instance judge 2, LM magistrate 5, LM magistrate 3, HM magistrate 5.

<sup>290</sup> LM appeals magistrate 2.

<sup>291</sup> LM first instance judge 5.

<sup>292</sup> LM first instance judge 5.

<sup>293</sup> LM first instance judge 4.

<sup>294</sup> LM magistrate 1.

According to a judge from the LM state, if defendants are presumed innocent, the work of the prosecutor and police is cast aside and impunity is consequently enhanced.<sup>295</sup> He continued:

Because only a few crimes are reported, and from those, only a few are indicted, and from those, only a very small proportion end in convictions. And then, with this idea [of presumption of innocence], guilty defendants are let go. This is known but not acknowledged.<sup>296</sup>

A different judge from the LM state held:

There is a concern that with the adversarial system there will be a growth in impunity because police officers torture, they break into houses without complying with legal requirements; with those flaws in the arrest, impunity will increase.<sup>297</sup>

According to this interviewee, it seems that fighting impunity is a much more pressing issue than holding law-enforcement agents accountable for illegal actions such as torture. Also, the illegal practices used to produce evidence appear not to conflict with the validity and truthfulness of the evidence presented to the court.

Concerns about impunity were mentioned by other judges too. Judges mentioned that the shift to adversarialism will cause a rise in impunity.<sup>298</sup> For instance, one interviewee held that by enforcing presumption of innocence, impunity will rise, and this means that the number of cases that are reported and end up in convictions will be even less.<sup>299</sup> Another claimed:

In the new adversarial proceedings, the most worrying part is that nothing will ever be proved because there is no training to investigate thoroughly ...there will be a lot of impunity; let's see if the state and citizens can take it.<sup>300</sup>

Another interviewee held that this was the worst moment to enforce presumption of innocence and human rights:

What we need now is an iron fist, to create order; we could safeguard human rights once we have made progress. We have weak institutions and if we add the human rights theme to the mix, they will become weaker.<sup>301</sup>

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<sup>295</sup> LM appeals magistrate 1.

<sup>296</sup> LM appeals magistrate 1.

<sup>297</sup> LM first instance judge 1.

<sup>298</sup> LM appeals magistrate 1, LM first instance judge 1, LM magistrate 2, LM first instance judge 2.

<sup>299</sup> LM appeals magistrate 1.

<sup>300</sup> LM magistrate 2.

<sup>301</sup> LM first instance judge 5.



Other judges commented on the inconvenience of enforcing presumption of innocence, taking into account the rise of rampant violence and the need for an iron fist to respond to violence.<sup>302</sup>

Different views on acquittals were also found. An interviewee held that Mexican judges are very tough as a result of incentives and sanctions within the judiciary. He explained that acquittals are much more scrutinised than convictions: “Whenever an acquittal is issued, suspicion or perception of corruption inevitably follows... this is the criterion to which we have grown used”.<sup>303</sup>

Another interviewee described a case where the governor of a neighbouring state publicly accused two magistrates of wrongly acquitting a defendant in a case of human trafficking. The interviewee had tried several cases on human trafficking and held that in this type of case the defendant does not act alone; rather, the whole family is involved in the offence. The judge, in support of the governor’s claim, added: “Surely there was some kind of link [between the magistrates and the defendant] or something that explains the acquittal”.<sup>304</sup>

Not only are acquittals badly thought of, but they are also distrusted within the judiciary, which fosters further suspicion concerning judges’ decisions. Pressure from inside the judiciary was corroborated. Interviewees acknowledged that acquittals are badly thought of by judicial auditors.<sup>305</sup> This was also observed in state judiciaries, where to have one’s acquittals reversed by higher courts hampers one’s career advancement (Concha et Caballero 2001; Pásara, 2006).

In my view, a genuine concern about public confidence in the judiciary and impunity can be seen in the accounts quoted above, all of which were made by judges from the LM location. The desire to tackle impunity can be explained by bearing in mind several issues. *FIRST* and foremost, the difference between the prosecutor’s role and the judge’s role is unclear; judges are expected to focus on ensuring fair trials without concern for crime and conviction rates. By comparison, the prosecution’s primary goal is to tackle impunity through indicting guilty offenders. The inquisitorial legacy may fuel the confusion; but also, as extensively discussed in the previous chapter, a concern for impunity is embedded in frequently quoted rulings, and this concern is reproduced by judges in their verdicts. *SECOND*, judges are forced to release defendants who may be guilty but against whom there is no solid evidence. Judges may experience frustration when acquitting those who, in their view, are guilty. They may also feel

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<sup>302</sup> LM appeals magistrate 1, LM first instance judge 5.

<sup>303</sup> LM magistrate 2.

<sup>304</sup> LM appeals magistrate 1.

<sup>305</sup> LM magistrate 2.

compelled to convict in the face of increased criminality. This was reported in both locations. As a judge claimed:

We cannot disregard the situation we are immersed in right now; nonetheless we are being asked to decide considering human rights, [the] presumption of innocence [and] adequate defence.<sup>306</sup>

THIRD, judges are blamed, both within the judiciary and by society, for releasing defendants, even though this may be the result of poor prosecution work, as will be discussed below.

The divide within the judiciary over presumption of innocence is evident in many accounts. As pointed out in Chapter 1, the aims pursued by criminal proceedings within the Mexican quasi-inquisitorial system is to determine the truth of the matter as opposed to requiring parties to prove their case. At the same time, the prosecution is legally presumed to be an independent state investigator who acts in good faith. Meanwhile, the defendant is tried largely based on how he is characterised in the case file. He is mainly treated as an object of proceedings rather than a subject with rights to enforce during proceedings. To shift towards an adversarial system, where the prosecution is required to prove its case beyond reasonable doubt and empower the defence, requires judges to cast aside their quasi-inquisitorial assumptions.

The judiciary is divided: on one end, judges with long and renowned careers seem reluctant to modify their way of weighing evidence and deciding cases. Further, they commented on the burden of having to acquit defendants who are presumed guilty even though they cannot be lawfully convicted. At the other end, judges seemed open for change, proud of their modern and internationally accepted way of thinking, and eager to enforce due process principles.

This bifurcation within the judiciary is mirrored in the social acceptance of the guilt. Judges, according to Baum (2006), value social acceptance and recognition from fellow judges, both those sitting in upper courts and their peers. Judges who are bold enough to present novel interpretations of the law and advocate new legal doctrines do so for several reasons: they seek to push good policy forward, but also to attract favourable attention and develop their reputation. “Judges who are innovators have the best chance to become well-known and widely respected within the legal community” (2006, p.108). Although Baum’s claims are based on an examination of the American judiciary, these claims are applicable to the Mexican judiciary in the present context, in which judges are being asked to evolve and some of them are already on their way while others remain reluctant.

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<sup>306</sup> LM first instance judge 3.

Some judges are acknowledged pioneers of adversarial principles. In the LM state, interviewees (judges and also public defence attorneys) noted that a colleague had the ‘trousers’ to acquit a defendant and dismiss evidence produced by the police in a property search. As a trend develops on an issue such as upholding adversarial principles, which is distant from or even foreign to traditional Mexican judicial decision-making, some may feel pressured to follow the trend rather than be left behind (Baum, 2006, p.110).

### *Evidence*

Judges from both states addressed questions of evidence from a variety of angles.<sup>307</sup> Several interviewees from the LM state held that both parties, prosecution and defence, have the right to produce evidence, even if police or military officers are reluctant to appear before the court to be cross-examined by the defence.<sup>308</sup> Whether evidence produced by the prosecution and the defence receives equal consideration was discussed by several judges from the HM state.

While one interviewee believed that evidence from both parties is weighed equally,<sup>309</sup> a few others felt that prosecution evidence tends to receive greater weight than defence evidence.<sup>310</sup> One explained that, in practice, the judge who analyses initial evidentiary material in order to issue a warrant at the beginning of the case or an intermediate resolution may use the same evidence to justify the final verdict.<sup>311</sup> This interviewee explained that ruling the case differently would imply the judge is being contradictory. Hence, the way rules are interpreted leads the judge to make an initial decision which most likely will stand until the end of the trial, most probably finding the defendant guilty, relying on the same evidentiary material since the very beginning.

Pásara, based on an analysis of 82 judgments issued by Mexico City courts, found a general concordance between what judges decided in the intermediate resolution and what they decided in the final judgment (2006). In retrospect, he argued, the final verdict contains the legal reasoning of the intermediate resolution, and at the same time reproduces what the prosecutor alleged in the initial accusation (Pásara, 2006, p.20). In practice, the indictment is not the initial point of the proceedings but is instead the foreseeable final outcome of the trial

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<sup>307</sup> LM first instance judge 2, LM first instance judge 3, LM first instance judge 4, LM magistrate 5, LM first instance judge 7, HM magistrate 4, HM first instance judge 2.

<sup>308</sup> LM first instance judge 2, LM first instance judge 4.

<sup>309</sup> HM first instance judge 2.

<sup>310</sup> HM magistrate 4, HM appeals magistrate, LM first instance judge 5.

<sup>311</sup> HM magistrate 4.

(Pásara, 2006, p.40). Although within inquisitorial systems, the pre-trial stage is the critical one, the mixed or quasi-inquisitorial system in Mexico attempts to be governed by adversarial principles during court proceedings.

The fact that evidence produced by the prosecutor need not be produced again in court constitutes an enormous disadvantage for the defence.<sup>312</sup> Case HMC6 was particularly illuminating in this regard. The police detained two people who testified in the public prosecutor's office that they had bought cocaine from the defendant, and, allegedly, the defendant was found in possession of 115 milligrams of the drug. These statements, together with police reports, amounted to a guilty verdict, even though one witness retracted in court and the other died during the course of proceedings. The defendant was sentenced with the minimum penalty of 10 years' imprisonment despite the fact that the verdict lacked corroboration from key witnesses and was sustained only by the police's corroborated testimony.

Evidence brought by the military was reported to have similar weight to that brought by the police. An interviewee from the HM state mentioned that cases where the military had produced evidence led to convictions almost by default, with the exception of cases based solely on confessions. He explained:

Soldiers produce evidence and the prosecutor provides additional evidence to corroborate [the case], but at times one thinks, soldiers have no reason to lie while the [defendant's witnesses] do have a reason to lie, because [the witness] is a friend, a relative who wants to exonerate the defendant.<sup>313</sup>

The benefit of the doubt granted to the military, as opposed to the defendant's witnesses, was only mentioned by one interviewee. However, it is far from exceptional. It was observed throughout judgement analysis that judges constantly gave law enforcement agents' evidence greater validity, notwithstanding allegations that contradicted their statements or any claims of mistreatment. Judges rather argued, without reference to any evidence, that these agents complied with legal requirements, which included being impartial. In support of this assertion, judges quoted rulings that presumed police officers to be impartial and independent in their judgements.<sup>314</sup> This finding is consistent with evidence found by Pásara's analysis of Mexico City judgments (2006). Pásara found that local judges also apply these rulings, which are not binding but appear to be compulsory. At the same time, judgement analysis

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<sup>312</sup> HM magistrate 4.

<sup>313</sup> HM magistrate 1.

<sup>314</sup> Non-binding ruling titled: "Police officers, evidentiary weight of their statements."

showed that defence evidence was systematically discarded. This same attitude was found by Pásara throughout the judgement analysis; he concluded that defence witnesses were granted less evidentiary value than prosecution witnesses (2006, p.13). Also, different binding and non-binding rulings issued by the SCJN indicate that judges should, for instance, disregard evidence given by defendants' relatives because they are presumed to be partial, based on their genuine interest in securing the defendant's release.<sup>315</sup>

Judges from the LM state shared their opinions about how to decide a case where sufficient evidence was lacking. Several judges felt that doubts about the defendant's involvement in the offence may not necessarily lead to acquittal.<sup>316</sup> For instance, one interviewee mentioned that judges supplement existing information with further evidence in order to issue a verdict based on sufficient evidence. This, according to interviewees, does not diminish their impartiality.<sup>317</sup> Other interviewees confirmed this by describing different strategies used to gather further information. They said that whenever they were in doubt concerning the facts of the case they would seek further evidence, such as by holding a follow-up hearing with the defendant or witnesses,<sup>318</sup> or closely observing the way the defendant behaved in court.<sup>319</sup> Another judge held that he had to be certain that the defendant was not responsible for the offence; otherwise he was more minded to convict.<sup>320</sup> Indications that judges supplement evidence reveals the inquisitorial feature of judges being responsible for most aspects of proceedings, including producing evidence whenever they felt it was needed for the final verdict.

### *The prosecution*

The prosecution's burden of proving its case beyond reasonable doubt is the other side of the presumption of innocence. Many interviewees discussed whether the reasonable doubt threshold was effectively exceeded, focusing particularly on the question of whether the prosecution's investigations and performance were effective. Other judges discussed the prosecution's unlimited power.

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<sup>315</sup> Non-binding ruling titled: "Witnesses in court proceedings (defendant's relatives)."

<sup>316</sup> LM magistrate 5, LM first instance judge 7, LM first instance judge 5, LM first instance judge 3.

<sup>317</sup> LM magistrate 5.

<sup>318</sup> LM first instance judge 7.

<sup>319</sup> LM first instance judge 3.

<sup>320</sup> LM first instance judge 5.

### *Prosecution's inefficiency and ineptitude*

Interviewees from the HM state mentioned that the prosecutor often filed indictments incorrectly.<sup>321</sup> Also, interviewees agreed that the prosecution's investigation is mostly poor and that indictments are weak and lack solid evidence.<sup>322</sup> As one said: "There is no investigation, everything is by coincidence".<sup>323</sup>

Another practice which judges said was frequent was that prosecutors charge defendants incorrectly. At times they submit indictments for a more serious offence despite lacking sufficient evidence to sustain the indictment. At others, the prosecution wrongfully pressed charges for minor offences.<sup>324</sup> For example, a judge noted that in drug cases, defendants are regularly charged for possession with intent to supply instead of simple possession. A first instance judge may correct the indictment, so that the defendant is tried for the correct offence. Nonetheless, the prosecutor may file an appeal and have the court of appeal reassert the initial indictment.<sup>325</sup>

A different judge described a case where an indictment for possession of a low-range firearm was filed. In this case, according to soldiers who participated in the arrest, the defendant began shooting at them from a light aircraft; when he was brought down they found not only the firearm but also cocaine and American, Mexican and Colombian currency. The soldiers even approached the judge and asked why he had not tried the defendant for the other offences; he replied that he could do nothing, as the prosecutor had not pressed any further charges. He pointed out that:

As a judge, you confront a dilemma if the prosecution did not do its job: how will I let [the defendant] go? You see the soldiers, the victims, so you rely on the slightest indications to hold the defendant responsible and increase his culpability.<sup>326</sup>

Poorly conducted investigations are suffered by defendants but also by victims. The prosecutor is legally required to take victims' views into account during proceedings. However, victim surveys have consistently shown that 78 percent of victims choose not to report an offence, mostly because they distrust the

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<sup>321</sup> HM appeals magistrate, HM first instance judge 1, HM magistrate 3.

<sup>322</sup> LM first instance judge 6, LM first instance judge 7, LM first instance judge 1, LM magistrate 2.

<sup>323</sup> LM magistrate 2.

<sup>324</sup> LM first instance judge 1, LM first instance judge 2.

<sup>325</sup> LM first instance judge 2.

<sup>326</sup> LM first instance judge 1.

authorities and because they believe it is a waste of time. Hence, an atmosphere of impunity prevails (ICESI, 2011).<sup>327</sup>

Interviewees referred to deficient investigations in conjunction with negligence and malpractice. Several mentioned that prosecutors find it easy to frame innocent people and fabricate evidence.<sup>328</sup> For instance, one said:

As a judge, one must also bear in mind that the prosecutor has pending files and at times includes the names of suspects [in the indictment], and one wonders, did [the suspects] really do it? Or were they framed?<sup>329</sup>

Another judge said:

The prosecutor's duty to investigate is negligently performed. He does not care who he indicts, we see it is deficient, we are more interested in protecting the defendants' rights, conscious that the investigation is deficient... we always think [the defendants] can be victims of circumstance, as opposed to the prosecutor, [who thinks] a person who is detained is already guilty.<sup>330</sup>

To describe prosecutors by flagging the differences between them and judges is interesting in the context of existing links between prosecutors and judges. In this regard, an interviewee mentioned that many judges are initially trained as prosecutors, which affects their understanding of constitutional rights and their relevance to due process.<sup>331</sup> The frequent career moves from prosecution to judiciary and vice versa were observed by Concha and Caballero in the context of local criminal justice practitioners (2001). This situation permits special knowledge of the way the other party may work and react, but also paves the way for personal ties between judges and prosecutors (2001, p.137-138). Though I did not register this information from federal judges, Concha and Caballero found that many state judges have prior professional experience as state prosecutors (2001).

The prosecutor's lack of investigation and deficiencies during the trial may be rectified by the judge. This amelioration may take the form of upholding evidence principles which give greater weight to initial evidence collected during

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<sup>327</sup> The ICSI, Citizen Institute for Studies on Insecurity, pioneered victimisation surveys in Mexico. The first survey was published in 2004 and surveying continued until 2010. At the end of 2011, President Calderón nationalised the victim survey and from that year onward, public institutions conducted the victimisation surveys.

<sup>328</sup> LM magistrate 5, LM appeals magistrate 2. HM first instance judge 1, HM magistrate 3.

<sup>329</sup> HM magistrate 3.

<sup>330</sup> HM first instance judge 1.

<sup>331</sup> HM first instance judge 1.



pre-trial,<sup>332</sup> supplementing the prosecution's evidence,<sup>333</sup> or trying to discover what actually happened in the case by close observation of the evidence produced as well as the defendant's conduct during hearings.<sup>334</sup>

The instances of malpractice highlighted by interviewees raise questions about the judiciary's role in limiting prosecutors' inappropriate behaviour. Magaloni (2009) argues that, historically, binding rulings issued by the scjn have led judges to endorse the prosecution's investigation and indictment in different ways. One example of this is the fact that the defendant's confession is valid if corroborated by other evidence, even when physical marks of mistreatment are shown. And the fact that the defendant's evidence has secondary weight, because it is produced later on in court proceedings, illustrates that the judiciary "gave the prosecution a blank cheque" to file false indictments rather than holding prosecutors accountable (2009, p.5).

### *Prosecution's lack of limits*

Abuses of power by the prosecution were frequently mentioned by interviewees.<sup>335</sup> According to one judge, the prosecution tends to file indictments based on weak evidence or on arbitrary and fabricated detentions.<sup>336</sup> Another judge noted that defendants who were mistreated in the public prosecutor's office were particularly reluctant to testify in court. A different interviewee said that when he noticed defendants had been mistreated by the police, he gave notice of mistreatment allegations to the prosecutor.<sup>337</sup> Another interviewee mentioned that if the defendant claimed he had been forced to testify, that would affect the weight the interviewee gave to that testimony. But if the defendant was beaten up without being forced to confess, the case was not affected by the mistreatment.<sup>338</sup> Another judge described cases of torture and arbitrary detention by the military on which the prosecutor failed to impose limits, but no comment was made in regard to any response from the judge to, for example, disregard evidence which had been produced illegally.<sup>339</sup>

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<sup>332</sup> LM magistrate 2.

<sup>333</sup> LM magistrate 5.

<sup>334</sup> LM first instance judge 3.

<sup>335</sup> HM appeals magistrate, HM magistrate 1, LM first instance judge 1, LM first instance judge 4, LM magistrate 2, LM magistrate 5. LM first instance judge 7 mentioned that defendants at times presented with bruises but he thought this did not amount to torture.

<sup>336</sup> HM appeals magistrate.

<sup>337</sup> LM first instance judge 4.

<sup>338</sup> LM magistrate 5.

<sup>339</sup> HM magistrate 1.

A dismissive attitude was found in some of the examined judgements, such as the one discussed in the previous chapter, where the judge made no comment in eight out of 13 cases where the defendant made allegations of mistreatment.

Like the judiciary, the prosecution holds the power to file criminal lawsuits against anyone, including court officials. The prosecution's privileged stand in front of the judiciary was mentioned by several interviewees and corroborated by Pásara (2006); among Mexico City judges, for instance, there is a credible fear of being indicted. The prosecution's lack of counterweight is well described by Wright:

In general, Mexican prosecutors face less competition from other institutions than do prosecutors in other systems in the Western Hemisphere [...] Compared to other Latin American prosecutors, the prosecutors in Mexico do not defer to judges in the overall conduct of investigations (2009-2010, p.372).

The interviewees' comments reveal a series of strategies judges use to amend the prosecution's negligent or corrupt work, including stepping into the prosecutor's role of building a solid case against the defendant. Judges' propensity to straighten out the prosecution's work may also help explain the high conviction rate and the interviewees' contrasting views on the prosecution's poor performance. At the same time, these practices described as common bring out a persistent quasi-inquisitorial ethos where the aim of determining the truth of the case takes priority over ensuring equal treatment to all parties involved.

In the new criminal justice system, the prosecutor will need to present the evidence collected in a public hearing, in front of the judge as well as the defence. One consequence will be that the practice currently displayed by judges to ameliorate or improve the prosecutor's work will be inhibited or, with luck, eliminated. As an interviewee noted, this change represents an enormous challenge in its own right.<sup>340</sup> General awareness of the prosecution's lack of rigour in proving its case, and the impunity that follows, collides with enforcing a new and imported principle—the presumption of innocence—because this new principle demands the release of defendants when there is insufficient evidence, even when defendants are most likely guilty and/or dangerous.

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<sup>340</sup> LM magistrate 5.

### *Custodial remand*

Several judges, mostly from the HM state, talked about custodial remand in the context of the presumption of innocence.<sup>341</sup> Comments were diverse: some judges defended its use, while others voiced open disagreement. In favour, judges argued that custodial remand ensures that the defendant is present during his trial, not tried in absentia. Also, it was held that though the defendant is detained, this does not mean he has been found guilty, because the final verdict has not yet been issued.<sup>342</sup> In contrast, those against custodial remand claimed it should be used exceptionally, which is not how it is currently used. According to one judge, this measure has caused mass incarceration, because so many offences are considered serious enough to make custodial remand compulsory. Even in cases where the sentences have been reduced, such as for minor drug cases, custodial remand is used if intent to sell or distribute can be demonstrated.<sup>343</sup>

To be tried while in custodial remand was also described as a sort of anticipated punishment, since the defendant has not been found guilty. Custodial remand therefore contradicts the presumption of innocence. It is only justified in cases, according to an interviewee, where there is reasonable fear that the defendant may escape or may hamper proceedings if left at large.<sup>344</sup> According to an interviewee, the problem lies in the fact that custodial remand is permitted in the Constitution, so Congress needs to reconcile it with the presumption of innocence.<sup>345</sup> Ultimately, judges who stand against custodial remand face the dilemma of upholding the law despite undesired and even harmful results, such as mass incarceration or anticipated punishment.

## Sentencing

To discuss sentencing, I asked judges several questions: “what are the key aspects of a case that determine the quantum of the sentence?” “What sentencing values or goals do you share?” “In your view, are these goals achieved?” Judges’ responses are divided into three main strands.

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<sup>341</sup> HM magistrate 4, HM magistrate 5, HM first instance judge 2, HM appeals magistrate, LM appeals magistrate 1.

<sup>342</sup> HM magistrate 4, LM appeals magistrate 1.

<sup>343</sup> HM appeals magistrate.

<sup>344</sup> HM first instance judge 2.

<sup>345</sup> HM magistrate 5.

### *Key aspects of determining a sentence*

The interviewees discussed several issues concerning sentencing, including the issues to take into account when a sentence is imposed, sentencing values, and the effectiveness of sentences, particularly custodial ones. Criminal legislation, as explained in Chapter 4, clearly establishes what issues are to be considered by a judge when imposing a sentence, and interviewees made reference to this legislation during the conversations. Interviewees also highlighted specific areas of concern.

Judges in both locations mentioned the relevance of defendants' personal characteristics, such as personality, revealed through examinations carried out in prison; propensity to reoffend; literacy level; whether he or she had a legitimate job or profession; and socioeconomic background.<sup>346</sup> For example, one interviewee said: "We cannot isolate the defendant's personality from the criminal event... it would be unfair".<sup>347</sup> Another one mentioned:

We cannot say we are not interested in the environment in which he grew up, how he offended, whether he is visited by his relatives, his literacy level, in other words, who the person is.<sup>348</sup>

One interviewee noted that some judges are more severe on defendants who offended while intoxicated.<sup>349</sup> Another stated that age was most relevant to him:

The young person is careless, he puts himself at risk, believes that all he does turns out well, while for the older person, life experience must have been present. ... I ask myself, how has age influenced the defendant whom we are going to sentence in the specific case?<sup>350</sup>

Interviewees explained that criminal records no longer constitute an aggravating factor and that only those defendants who had recently been convicted were punished more harshly.<sup>351</sup> However, interviewees mentioned that previous convictions were relevant.<sup>352</sup> And, a judge added, the severity of the sentence was increased if the defendant was a career criminal.<sup>353</sup> As explained in Chapter 4, according to criminal legislation recidivist offenders are punished more se-

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<sup>346</sup> HM first instance judge 1, HM magistrate 5, LM first instance judge 4, LM magistrate 1, LM appeals magistrate 2.

<sup>347</sup> LM first instance judge 5.

<sup>348</sup> HM magistrate 2.

<sup>349</sup> HM magistrate 5, though he did not share this view.

<sup>350</sup> HM magistrate 3.

<sup>351</sup> HM magistrate 4, HM magistrate 5, HM appeals magistrate.

<sup>352</sup> LM first instance judge 4, LM first instance judge 2, LM magistrate 5.

<sup>353</sup> LM first instance judge 7, LM magistrate 5.

verely, particularly if they are found to be habitual offenders, which means that the length of the sentence is increased and parole benefits are curtailed.

The way in which the offence was committed was very significant to the great majority of interviewees,<sup>354</sup> which is consistent with the list of aspects to be considered in sentencing established in criminal legislation. This aspect includes whether the defendant took advantage of the victim in any way, or whether he offended voluntarily or accidentally.<sup>355</sup> It also included the degree to which life, public health or any other legally protected right was put at risk. An interviewee explained that public health, for example, was put at risk differently if 10 kilograms as opposed to 10 grams of cocaine were found.<sup>356</sup> This judge and others considered the motive for the offence to be particularly important.<sup>357</sup>

Interviewees agreed that it was important to distinguish the way in which the defendant participated in the offence; for example, whether he offended as part of a group or whether he committed several offences.<sup>358</sup> “The woman who fed the kidnapped victims is not the same as the person who actually kidnapped them”.<sup>359</sup>

The way the offender reacted to the arrest,<sup>360</sup> the seriousness of the offence and the harm caused were also analysed.<sup>361</sup> Whether the defendant was making up a story during trial was also considered relevant,<sup>362</sup> along with the likelihood of rehabilitation and the odds of reoffending.<sup>363</sup>

Consistent with what was argued in the introductory chapter concerning increases in sentencing tariffs, most interviewees from both locations held that lawmakers have made sentences much more severe and created new offences.<sup>364</sup> For example, several states, including the HM one, recently included in legisla-

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<sup>354</sup> LM first instance judge 4, LM first instance judge 2, LM first instance judge 6, LM first instance judge 1, LM first instance judge 7, LM magistrate 2, LM magistrate 4, LM appeals magistrate 2.

<sup>355</sup> HM magistrate 2, HM magistrate 5, HM first instance judge 1.

<sup>356</sup> HM first instance judge 2.

<sup>357</sup> HM first instance judge 2, LM first instance judge 6, LM first instance judge 7.

<sup>358</sup> LM magistrate 1, LM magistrate 4, LM first instance judge 4, LM first instance judge 7.

<sup>359</sup> LM magistrate 1.

<sup>360</sup> LM first instance judge 3, LM first instance judge 4.

<sup>361</sup> LM appeals magistrate 1, LM first instance judge 6, LM magistrate 3.

<sup>362</sup> LM first instance judge 1.

<sup>363</sup> LM first instance judge 1, LM first instance judge 7.

<sup>364</sup> LM first instance judge 1, LM first instance judge 2, LM first instance judge 5, LM magistrate 2, LM magistrate 4, HM magistrate 2.

tion the offence of warning members of criminal organisations about law enforcement's routes, operatives and practices. However, no mention was made of the idea that judges would, as a result of changes in statute or for any other reason, impose sentences towards the higher end of the sentencing tariff. On the contrary, judges from the LM state described a general tendency towards imposing sentences at the lower end of the tariff.<sup>365</sup>

According to one interviewee, minimum sentences need no further justification from the judge, whereas when imposing higher ones the judge must justify the greater severity.<sup>366</sup> Another interviewee mentioned that a binding ruling issued by the SCJN stated that further justification was only needed when a sentence higher than the minimum was imposed. As discussed in the previous chapter, this ruling was only quoted by a few judges, even though it was found that the large majority of courts across both locations imposed the lowest possible sentence.

A different interviewee explained that minimum sentences were a daily practice in locations where drug-trafficking organisations operate. The minimum sentence represented a middle ground where defendants couldn't hold anything against the judge:

That way offenders can no longer say 'darn judge, he gave me the medium or the maximum sentence'; yes, it [the offence] was demonstrated but I applied the minimum sentence.<sup>367</sup>

This might help understand the minimum sentence imposed by the judge on a defendant (NC15) whose gang shot at the army. To sentence taking into account the judges' safety was not mentioned by any of the interviewees from the HM state, however.

### *Sentencing goals*

Discussion about sentencing goals inevitably touched on the sentencing values embedded in article 18 of the Constitution. Traditionally, rehabilitation (and, recently, reintegration) is the goal of sentencing, so judges constantly commented on rehabilitation aims. In order to approach other sentencing values and goals, including deterrence and retribution, I asked specific questions such as: "what do you think about retribution?" and "do you agree with deterrence?" Most interviewees touched upon both retributive and preventive values. Interviewees shared both types of values and only exceptionally expressed a preference or disregard for either of them.

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<sup>365</sup> LM magistrate 5.

<sup>366</sup> LM first instance judge 7. This was also mentioned by a different judge from Mexico City.

<sup>367</sup> LM magistrate 3.

Interviewees agreed that rehabilitating the offender was a main objective in sentencing.<sup>368</sup> This could be explained by the fact that rehabilitation is the constitutional value that sentencing is supposed to achieve. Judges explained the sentence as a way of helping the defendant to reflect upon his behaviour and providing him with the tools to be part of society again.<sup>369</sup> For example, one judge said: “The punishment’s purpose is to re-educate, reintegrate, so that when you are released you can re-enter society with a positive role”.<sup>370</sup>

Also, interviewees mentioned that rehabilitation should be sought only in particular types of case, such as those involving non-dangerous offenders.<sup>371</sup> In this regard, an interviewee suggested that female offenders who participate in criminal groups as lookouts may merit a sentence designed to rehabilitate them.<sup>372</sup>

Judges also touched upon deterrence.<sup>373</sup> It was claimed that punishing the defendant sends a message to society to discourage offending.<sup>374</sup> Guilty verdicts and custodial sentences should intimidate people and stop them offending.<sup>375</sup> “The sentence has an effect on the people who are considering offending”.<sup>376</sup>

In particular, one judge held that the sentence deters those who have a close connection to the defendant and who might be prone to offend, given that they are immersed in the same environment.<sup>377</sup> Another mentioned that colleagues tend to impose the highest possible sentence on offences where harm and suffering are long-lasting, such as kidnapping or extortion.<sup>378</sup> Other judges shared the view that the deterrent effect is indeed accomplished.<sup>379</sup> For

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<sup>368</sup> HM magistrate 2, HM magistrate 3, HM appeals magistrate, LM first instance judge 5, LM first instance judge 4, LM first instance judge 6, LM first instance judge 1, LM first instance judge 2, LM magistrate 4, LM appeals magistrate 2, LM magistrate 3.

<sup>369</sup> HM magistrate 2, HM magistrate 3, HM appeals magistrate, HM first instance judge 1, LM first instance judge 2.

<sup>370</sup> LM first instance judge 2.

<sup>371</sup> HM magistrate 4, HM magistrate 1.

<sup>372</sup> HM magistrate 1.

<sup>373</sup> HM magistrate 1, HM magistrate 3, HM magistrate 5, HM first instance judge 2, HM first instance judge 1, LM appeals magistrate 1, LM first instance judge 1, LM first instance judge 2, LM appeals magistrate 2.

<sup>374</sup> HM first instance judge 2.

<sup>375</sup> LM appeals magistrate 2, LM first instance judge 7.

<sup>376</sup> LM first instance judge 5.

<sup>377</sup> LM first instance judge 2.

<sup>378</sup> LM magistrate 1

<sup>379</sup> HM magistrate 1, HM magistrate 3, HM magistrate 5, LM magistrate 1



example, an interviewee stated: “The sentence is the only way to eradicate and avoid [offending] to a certain degree; if A sees that B offended, A does not do it”.<sup>380</sup>

Some interviewees also mentioned that the sentence attempts to set an example.<sup>381</sup> Accordingly, high sentences are applied so that others see that the consequence of crime is imprisonment.<sup>382</sup> Other interviewees openly disagreed with deterrence.<sup>383</sup> For instance, one judge held that deterrence was ineffective because people are no longer afraid to go to prison. He also thought that there were too many cases of recidivism and that criminality should be dealt with differently.<sup>384</sup>

Commentaries on incapacitation were less common. Judges described imprisonment as a way of safeguarding society from depraved influences or from further harm.<sup>385</sup> An interviewee explained that some custodial sentences sought to provide the prisoner with the tools for rehabilitation but also to keep him away from society in case he reoffended once freed, for example in cases of violent murder.<sup>386</sup>

A judge from the HM state talked of eliminating particular types of offender from society.<sup>387</sup> In describing a case where a mayor was shot by his own guards, who had previously kidnapped him, the judge said:

These [hit men] are people who show disdain for life, leaving a feeling of ‘what are these people doing here? How can they rehabilitate themselves?’ They ought to be kicked out of society because society is in danger... in the majority of cases, the sentence constitutes punishment, and where society has an interest in seeing that the defendant stays inside, like those hit men, there is no interest in their rehabilitation; it is social prophylaxis.<sup>388</sup>

In sum, interviewees from both locations agreed with incapacitating only par-

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<sup>380</sup> HM magistrate 3.

<sup>381</sup> HM appeals magistrate, HM first instance judge 2. This was explained by several interviewees but one of them mentioned disagreeing with this view.

<sup>382</sup> HM appeals magistrate.

<sup>383</sup> LM first instance judge 4, LM magistrate 2, LM magistrate 4, HM appeals magistrate, HM magistrate 4, HM magistrate 2.

<sup>384</sup> HM magistrate 4.

<sup>385</sup> HM magistrate 3, HM magistrate 5, LM magistrate 5, LM first instance judge 7.

<sup>386</sup> LM magistrate 5.

<sup>387</sup> HM magistrate 1.

<sup>388</sup> HM magistrate 1.

ticular types of offenders, as opposed to all types. A judge voiced the desire to eliminate offenders, similar to what enemy penology prescribes when sentencing enemies.

In regard to retribution, judges described punishment in terms of life lessons and part of the bargain for living in society as well as infliction of pain.<sup>389</sup> For example, an interviewee said: “Punishment, according to the Constitution, seeks to rehabilitate, but the sentence consists of suffering, it is undeniable”.<sup>390</sup> Another one mentioned: “Punishment is a lesson...now you pay for the harm done to society”.<sup>391</sup> A different judge said: “I believe punishment should cause suffering; being away from family, that shock, that experience could be a landmark”.<sup>392</sup>

Others mentioned that the sentence sought to punish the defendant, hold him accountable<sup>393</sup> and help him repent,<sup>394</sup> but at times it failed to be proportional.<sup>395</sup> A minority expressly disagreed with retribution.<sup>396</sup> For example, one judge said that if the sentence is understood as punishment, it fosters resentment against the state in the convicted person.<sup>397</sup>

A judge described a case in which he imposed a sentence that sought to be fair.<sup>398</sup> A woman was arrested for possession with intent to supply five kilograms of marijuana. She was 18 years old, had four children and had just given birth to a fifth; her initial declaration was taken by the judge while she was still in hospital. The defendant had confessed to possessing the drug to sell it and also mentioned that she was worried sick because she didn’t know where her other children were. The judge, the prosecutor and the public defender realised the woman’s vulnerability and that she was going to remain in custodial remand. “I asked myself, what can you hold against this woman?” The judge decided to convict her of a lesser charge, simple possession, so that she could be released, and explained in detail the defendant’s personal circumstances in the

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<sup>389</sup> LM first instance judge 4, LM first instance judge 5, HM magistrate 2, HM magistrate 1, HM magistrate 3, HM magistrate 5.

<sup>390</sup> HM magistrate 2.

<sup>391</sup> HM magistrate 3.

<sup>392</sup> HM magistrate 1.

<sup>393</sup> LM first instance judge 2, LM first instance judge 4, LM magistrate 1, LM magistrate 2.

<sup>394</sup> LM first instance 7, LM magistrate 5.

<sup>395</sup> LM magistrate 2, LM appeals magistrate 2.

<sup>396</sup> HM magistrate 4, HM appeals magistrate.

<sup>397</sup> HM magistrate 4.

<sup>398</sup> LM first instance judge 1.

judgment so that the appeals court would understand what had motivated him to punish her for a less serious offence. In the end, the judge said, the prosecutor even donated money to pay for the defendant's bail.

Facing victims was a theme amply discussed by judges in the context of having to acquit defendants for lack of evidentiary material. Interviewees from the LM state held that part of the goal of the sentence was to repair the harm done to the victim.<sup>399</sup> Another said the sentenced aimed<sup>400</sup> "to give something back to the victim".<sup>401</sup>

The harm done, not to society in general but to specific people, was relevant in sentencing for these judges.

The discussion of rehabilitation and other sentencing goals made unavoidable the fact that in most cases rehabilitation is not achieved. Most interviewees from both sites pointed out that though rehabilitation is embedded in the criminal justice system, it frequently does not happen.

What keeps convicted people from rehabilitating and reintegrating into society? According to judges, minor offenders develop the know-how to commit increasingly dangerous offences.<sup>402</sup> Others mentioned that prison conditions hamper rehabilitation as they lack proper facilities, not only education and training but also basics such as water, food and health services.<sup>403</sup> Several interviewees mentioned the unsafe conditions in prisons, including overcrowding and the mistreatment and extortion of convicts and their families.<sup>404</sup> Another judge said that prisoners are incarcerated and kept away from society but at the end of the sentence are not reintegrated into society.<sup>405</sup>

A different interviewee maintained that those prisons that are not overpopulated do accomplish rehabilitative goals by providing training, such as carpentry and metalwork. However, when released, the offender cannot re-enter society as jobs are rarely given to ex-convicts; nevertheless, the convict is still expected to provide for his family, put food on the table. As a result, society pushes convicts into reoffending. "Society is failing ex-convicts by not

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<sup>399</sup> LM first instance judge 2.

<sup>400</sup> LM magistrate 1.

<sup>401</sup> LM magistrate 1.

<sup>402</sup> HM appeals magistrate, HM first instance judge 1. LM first instance judge 5, LM magistrate 4, LM magistrate 5.

<sup>403</sup> HM appeals magistrate, HM magistrate 4, HM magistrate 2, LM first instance judge 1.

<sup>404</sup> LM first instance judge 2, LM first instance judge 3, LM magistrate 4, LM appeals magistrate 1, LM appeals magistrate 2.

<sup>405</sup> LM appeals magistrate 2.

offering them a second chance once they have regained their freedom”.<sup>406</sup>

Interviewees noted that the sentence is served not only by the convict but also by his family, left without any support.<sup>407</sup>

Having a relative in prison means the family is also imprisoned, because they have to cooperate from the outside to provide him with money, food, clothes to survive inside... if the prisoner is released, so are the rest.<sup>408</sup>

Conditions within the great majority of prisons are unlikely to fulfil the Constitution’s goal of reintegration into society. According to the National Commission for Human Rights’ Prisons Report, prisons across the country are mostly overpopulated and lack access to basic goods and services, as well as training and sports facilities (CNDH, 2013). A study conducted to determine the actual costs of prison, including custodial remand, found that families tend to provide the convict with basic goods such as food, clothing and medicine, pay for legal assistance, spend time in visits and pay for extra-legal expenses including bribes to prison officials to deliver the food or allow family visits (Zepeda Lecuona, 2009, p.60-64).

## Discussion and preliminary conclusions

### *General findings*

The key finding from this chapter is that enemy penology was absent from the interviewees’ accounts of their work, how they saw offences and offenders and how they should be dealt with. And no substantial difference was traced between judges from the HM state and those from the LM state to demonstrate that either of these groups embraced an enemy penology model. According to judges from both locations, defendants are not seen as risks to society or enemies to exterminate. Defendants are sentenced with leniency, which judges said was designed to enable their rehabilitation and reintegration rather than their elimination from society. These were views shared by judges from both locations.

Also, it was clear that presumption of innocence is not based on the type of defendant or offence. There is a current imbalance between the prosecution and the defence, but this seems unrelated to the president’s war on organised crime. The conviction ratio shows that the great majority of defendants have only a small chance of being acquitted, bearing in mind the generalised prosecution’s

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<sup>406</sup> HM magistrate 5.

<sup>407</sup> HM magistrate 3, HM magistrate 4, LM first instance judge 2.

<sup>408</sup> LM first instance judge 2.

poor quality performance.<sup>409</sup> The defendant is constantly at a disadvantage in court, because he faces a large burden of incriminatory evidence produced at the very beginning of trial proceedings which will be used in the final verdict. Notwithstanding this, the prosecution was said consistently to lack rigour in demonstrating its case and has been known to frame suspects; hence it appears that, even in cases of weak investigation, defendants are convicted all the same. It is difficult to reconcile the claim that defendants are presumed innocent until proven guilty by the prosecutor, as many interviewees did, with the claim that defendants begin trial from a disadvantaged position and that prosecutors file weak cases. It is more likely that judges resort to denying that defendants are not presumed innocent, and that ultimately defendants are not offered a fair trial, at least in the first instance.

One difference found between judges from the two states concerned what accounts for ineffective presumption of innocence. Judges from the HM state held that judges convict defendants because they are strongly influenced by pressure exerted by the parties involved and by administrative incentives. Also, they described procedural rules that facilitate the conviction of defendants by upholding the prosecution's case, which stands unchallenged by the defence during the pre-trial phase. By comparison, judges from the LM state commented on the inconvenience of the presumption of innocence, noting the small chance of rearresting a defendant, the rise of impunity in a context of unsafety and the large number of offences that go unreported and unpunished. Whether judges think about these problems when deciding cases cannot be known for certain. However, several mentioned that enforcing human rights and due process principles was not easy in the current context of insecurity and that these rights and principles were new and consequently not yet accepted by all. Also, they discussed the need for a tougher approach to crime, the frustration of having to release a dangerous offender due to state corruption or negligence, and that gathering further evidence before issuing a judgement was common practice.

These sorts of claims shed light on the ways in which judges assume crime control responsibilities which should be the province of members of the executive branch, even though they were historically shared between the prosecution

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<sup>409</sup> In other jurisdictions such as England and Wales the conviction ratio, according to the Ministry of Justice, reached 82 percent in 2014. This ratio is formed by both defendants found guilty and those who plead guilty. Guilty pleas are a common mechanism to dispose of cases before reaching a final verdict, for instance, 89.6 percent of the number of offences sentenced by the Crown Court were guilty pleas (Ministry of Justice, 2014). This trend is similar in the magistrates' courts (Ashworth & Redmayne, 2005).

and the judiciary. Conversely, those views were not expressed in the HM state. One possible reason is that I interviewed fewer trial judges. Another possible reason may be that both federal judges and state judges in that state are more familiar with applying adversarial principles, because the state criminal procedure legislation began adopting the new rules in 2006. This change did not begin in the LM state until 2011.

According to Guarnieri, Pederzoli and Thomas (2002), institutional settings akin to inquisitorial systems give judges greater power than the parties in court and allow them to exert much more influence in the case, for instance by gathering further evidence. By comparison, judges within adversarial settings stand aside so that parties can each present their case. Possibly, judges in the LM state who have not been in contact with adversarial procedure rules still see their duty as encompassing greater responsibilities than those judges who have engaged in adversarial proceedings. Further, these responsibilities are directly linked to crime control concerns such as impunity or the chance of rearresting defendants. According to Cavise (2007), judges trained in adversarial principles found it difficult to let go of these responsibilities.

Also, studies such as that of Glick and Vines (1969) on judicial attitudes and roles showed that the political environment in which judges are located exerts some influence on judges' role orientation. In this regard, judges who are based in the HM state, which pioneered adversarial proceedings at the state level, may be much more open (or less resistant) to embracing a new set of principles. Conversely, judges in the LM state, where the criminal justice reform at the state level was just beginning, may be more resistant to change.

Nevertheless, despite a context where, following enemy penology, judges were expected to allocate guilt, curtail rights and impose severe punishment in order to eliminate defendants seen as enemies, the federal judiciary was found to be unaffected by these expectations. What accounts for the inability of enemy penology to shape judges' views? Seeing judges within the legalist model of judicial behaviour, where ritualist and law-interpreter roles are enhanced, or within a bureaucratic judiciary where higher courts exert control on the lower ones to safeguard legal certainty and continuity, helps understand why enemy penology was not embraced. Furthermore, rigorous precedent adherence illustrates the institutional goals of fostering continuity and legal certainty. This plausible explanation is discussed below.

### *Drawing from judicial behaviour theories and judicial roles*

A legalistic model of judicial behaviour holds that judges apply the law and precedents accurately to the case in hand while remaining detached from many other factors. In this research, it seems that the judges also sought to insulate themselves from the president's criminal justice policy, which entailed declaring 'war on organised crime'. My initial hypothesis was that this rhetoric would be endorsed by the judiciary, particularly those located in a conflicted and militarised environment. However, this did not play out in practice in judicial activity in the courts. Essentially, Mexican judicial behaviour, as described during the interviews, fits with the legalistic model based on the fact that judges are expected to follow templates, precedents and applicable law when issuing a decision. It was also found that at times judges said they had only limited discretion to decide whether the defendant was guilty or not and what sentence to impose, either due to over-criminalisation or because of high sentencing tariffs established by law. According to Concha and Caballero (2001), the judge's discretion is marginal; he/she is expected to apply written law, largely explained by the Mexican legal tradition and inherited from European civil law systems. However, López Ayllón and Fix-Fierro (2003) as well as Taruffo (2003) argued that judges are unwilling to take full responsibility for their own decisions while drawing on legislation or applicable precedents.

At the same time, ritualist or law-interpreter roles were traced in comments such as those where judges claimed to be focused on applying the law accurately to the case at hand and where further interpretation of the law, for example drawing on international human rights treaties ratified by Mexico, was overruled. Conceiving their role to be restricted to applying the law mirrors an attempt to remain uninvolved in politics or policy-making when trying cases and implies that the scope for creative legal interpretation and argumentation is limited and thus cannot affect policies. This is linked to a legalistic model that explains judicial behaviour in terms of applying the law to cases, disregarding ideology, policy goals, or other actors' courses of action.

Also, the verticality of the Mexican judiciary reinforces judicial roles that involve low creativity and a rigorous adherence to the law and to precedents, as the opinions of interviewees showed. This is illustrated in accounts where a judge considered it dangerous to disregard binding rulings, or where a judge decided the defendant was guilty based on a binding ruling while being convinced evidence was insufficient to allocate guilt. The judicial bureaucracy's reluctance to accept creative legal reasonings outside the accepted values and desire to reinforce strict observance of rulings highlights the vertical control exerted from the higher



courts to the lower ones, while the institutional goals of legal certainty and continuity are fostered.

Judges also commented on the changing understanding of the judicial role in the light of the criminal justice and human rights reforms. These reforms represent a deep change in the judge's role within criminal proceedings and require judges to disregard legislation that contradicts human rights standards. The reform means judges will no longer be completely bound by black letter law and possibly make them take greater ownership of judicial decision-making. Comments made by judges linked to the reforms may signal that judges may begin to shift towards a more law-maker and decision-making role where policy can be influenced through their decisions. However, for this to happen, the accepted values and institutional goals of legal certainty and continuity would need to be replaced by goals rewarding creative legal interpretation, favouring judges' influence in policy-making. At the same time, allowing lower courts to interpret in a more creative manner to the extent of making law or making policy would threaten vertical control.

Pragmatist voices were also heard during interviews, revealing strategies used by judges to reach what they believe is a fair decision. One clear example concerned a judge who, based on the specific situation of the defendant, opted to reduce the charges against her, despite the fact that she was probably guilty. This case illustrates the mediator role suggested by Flango, Wenner and Wenner (1975), where the judge relied much more on his own common sense than on public policy on drugs.

Also, several interviewees described the judiciary as a decisive or at least very significant player in the political arena in providing order and in striking a balance between defendants' rights and society's demands for greater safety. These comments seem to indicate an adjudicator role, where the judge's function is to settle disputes as an arbiter and decide cases where contending values are in question.

Overall, judges differ widely in their opinions, and these differences are not related to their rank or tier. Their behaviour and actual performance, although shaped by a legalistic tradition, may vary in accordance with how they understand their role and how they think their role is seen by others.

### *Diverse and conflicting concerns*

Robbennolt, MacCoun and Darley (2008) claim that judges and courts are confronted with a wide range of constraints and incentives. If these are taken into account, a greater understanding of judges' decisions can be achieved than when simply bearing in mind ideological viewpoints, policy goals or managerial objectives.

During fieldwork, judges often illustrated their views with examples of different cases. However, thorough information of specific cases was not collected, so an analysis as suggested by Robbennolt, MacCoun and Darley is not possible. Nevertheless, the different opinions given by interviewees illustrate that judges consider many interests, actions, needs and concerns when deciding a case. These may be linked to both the merits of a case and to external factors. For instance, when discussing presumption of innocence, judges described how they considered several aspects such as: the defendant's behaviour in court, the evidence produced by the parties, the obligation to apply specific precedents, the need to avoid reversals, the chances of facing retaliation from the attorney general's office, and the judiciary's lack of social credibility. This shows that judges take into account many different constraints and incentives when making a decision.

Further, links between these interests, concerns and needs may be traced to understand judicial behaviour more fully. For instance, a particular decision may be better explained bearing in mind a judge's obligation to apply precedents and the desire to avoid reversals linked to goals concerning career advancement, than the merits of the case. This shows that specific decisions are hardly ever explained by one factor alone, and also that each judge faces various constraints and incentives and considers them differently in a given context.

### *Judges' audiences*

Judges showed concern for the way in which they are perceived by society. For instance, it was mentioned that they are portrayed as negligent and corrupt if they decide to acquit a defendant who has already been condemned as guilty by the press. Mentioning that judgements must explain why a particular defendant was found guilty and how the imposed sentence was determined illustrates that judges are concerned with how society sees them. The extent to which society shapes judicial decision-making is not analysed here, but concerns for social credibility and social approval reveal that judges believe society is attentive to them and their decisions.

It also appeared that judges see their peers as an audience. Interviewees from different ranks, particularly those at the lowest instance, showed awareness of how peers and superiors reach decisions and whether their judgements will be confirmed or reversed. Also, judges' public positions on novel legal policies such as enforcing human rights and due process principles signifies that judges are receptive to their peers' recognition and actions. Judicial decision-making offers an opportunity for individual judges to present themselves both in court and outside it.

Seeing judges' audiences helps understand some of the factors outside the case file that may shape judicial behaviour and judicial decision-making. Judges may issue a judgement to minimise social discontent, to avoid a reversal, to convince a higher judge to rule in a fairer way or to prove themselves modern or rebellious. This is not to say that judges decide based solely on the likelihood of an upper court overturning a decision, for example, but rather that judges bear in mind the likely response of upper courts, peers and society in general when deciding a case or making a legal argument.

The extent to which the president and other members of the executive constitute a relevant audience for judges is the concern of the next chapter, where the military's involvement in criminal proceedings and judicial independence are discussed. To this point, however, it seems that the judiciary appear to be insulated from the enemy penology paradigm put forward by public statements, policies and laws on national security and crime control.



## Judicial voices on the military and judicial independence

### Introduction

In earlier chapters, I concluded that judges appeared not to enact an enemy penology model. This conclusion was largely based on how they see defendants, whether they have lowered procedural guarantees to foster convictions, and sentencing. In this chapter, I examine the wider context in which enemy penology operates in order to examine judges' views on the army's involvement in criminal proceedings and in public safety tasks; judges' own understanding of their independence; and their role in a challenging environment. At the same time, I trace commonalities and differences between the two sets of judges.

It was found that judges from both locations disagreed with military involvement in crime control activities because soldiers lack the necessary training in conducting crime investigations. Judges from both states agreed that there is no substantive change in proceedings when soldiers are involved, for they are treated the same as other law enforcement agents. One difference that was found concerned judges' views on the military's abusive practices. While judges in the LM state were highly critical of the military, describing their behaviour as unlawful and arbitrary, judges in the HM state had various opinions.

Judges' roles and reactions to violent and militarised environments were discussed by interviewees and several kinds of responses were found. Yet the differences and similarities in accounts showed no relationship to the location of the interviewees. The only difference was the openness with which interviewees from the LM state discussed judges' reactions to dangerous environments. These reactions ranged from feeling fearful to adapting their legal reasonings to the context. Finally, judges from both locations agreed that judges are independent from other branches of government but are subject to several kinds of influence and pressure.

## Participation of the army in court proceedings

I asked judges: “Has the way of managing proceedings been affected by the army’s increasing participation in public safety matters?” (For example, in aspects related to crime investigation or production of evidence). This question allowed the discussion to touch upon the military’s role during proceedings but also their general views on the military and its involvement in public safety matters.

### *General views on the army*

Interviewees shared opinions on the military’s participation in public safety and crime investigation. Most of the interviewees in both locations considered that it was not desirable to rely on the military to perform policing work. The military’s involvement was explained by interviewees as a necessary response by the state in the face of police incapacity.<sup>410</sup> Judges from the HM state agreed that the army’s involvement began when the police were infiltrated by and colluded with criminals. Police officers had been found to be members of criminal groups. Officers had been killed or were frightened to be involved in investigating members of criminal groups.<sup>411</sup> A judge said that in effect: “We were left without police”.<sup>412</sup> The impression that police effectively ‘disappeared’ from the criminal justice system illustrates the seriousness of the safety crisis, where daily violence and lawlessness were experienced across the state.

According to a judge in the HM state, people saw the military’s intervention as a relief.<sup>413</sup> He felt that society had greater trust in the army than the police, especially because soldiers appeared to be much more effective in ensuring safety and a general sense of order and control. A judge from the LM state, but originally from a different state noted that in his hometown people generally felt better and safer once the army began patrolling the streets.<sup>414</sup> However, another judge felt that drawing on the military meant “bringing war to our own people”.<sup>415</sup> Another said that the military patrolling the streets was the real result of its involvement in public safety tasks, and it was quite shocking to

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<sup>410</sup> LM magistrate 5, LM appeals magistrate 2, LM first instance judge 5, LM first instance judge 7, HM magistrate 1.

<sup>411</sup> HM magistrate 1, HM magistrate 4.

<sup>412</sup> HM magistrate 1.

<sup>413</sup> HM magistrate 4.

<sup>414</sup> LM first instance judge 5.

<sup>415</sup> LM appeals magistrate 2.

see military convoys patrolling the streets, heavily armed and aiming forward, which meant that if anybody stood in their way, they could simply fire.<sup>416</sup>

### *The army and court proceedings*

The increased participation of soldiers in crime investigation and the arrest of suspects was the result of military involvement in the “war on organised crime” waged in the several regions of the country where drug-trafficking groups operated, including the HM state. The extent to which the military affected court proceedings was one of the key questions asked to reveal to what extent judges were affected by this policy.

The judgements analysed in this research showed that the military’s participation in crime investigation and subsequently in trial proceedings was substantially greater in the HM state than in the LM state. Even so, most judges in both locations described only minor effects in court proceedings.<sup>417</sup> Interviewees mentioned that these changes were reflected in the fact that soldiers, as opposed to police, were arresting suspects.<sup>418</sup> In practical terms, this meant that the number of reported cases rose. In particular, drug cases increased, because the federal government had tasked soldiers with fighting drug-trafficking. However, this did not change proceedings substantially; cases continued to be managed and filed by the prosecutor, just as if the investigations had been carried out by the police.<sup>419</sup> Soldiers, like police officers, produced reports explaining how the offence took place and the manner of the defendant’s arrest.<sup>420</sup> Their actions included confiscating firearms and drugs after entering premises or stopping and searching vehicles at checkpoints.<sup>421</sup>

In respect of evidence collection, judges agreed that proceedings remained essentially unchanged.<sup>422</sup> The military’s participation was noticeable in more practical ways; for example, a judge observed that proceedings were delayed when soldiers who were witnesses to the arrest had been transferred to a different part of the country and he had to wait to cross-examine them in court.<sup>423</sup>

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<sup>416</sup> LM first instance judge 2.

<sup>417</sup> HM appeals magistrate, HM magistrate 1, HM magistrate 4, HM magistrate 5, HM first instance judge 1, LM first instance judge 2, LM first instance judge 7, LM magistrate 5.

<sup>418</sup> HM magistrate 5, LM magistrate 2.

<sup>419</sup> HM magistrate 5 and also mentioned by HM public attorney 5.

<sup>420</sup> HM appeals magistrate, HM first instance judge 2, HM magistrate 5.

<sup>421</sup> HM magistrate 1.

<sup>422</sup> HM magistrate 1, HM magistrate 5.

<sup>423</sup> HM first instance judge 1.

In sum, judges from both locations did not report any substantive changes in proceedings due to the military's involvement in crime investigation. Judgement analyses corroborated this: soldiers and police officers were treated alike, as was the evidence they produced.

### *Commenting on military abuses*

The army's lack of training in performing investigative tasks was frequently mentioned by judges from the HM and LM states.<sup>424</sup> According to interviewees, the army should protect national security rather than conduct crime investigations.<sup>425</sup> Concerning military abuses of power and mistreatment of suspects, comments varied. On one side, several interviewees from the HM state mentioned that soldiers tended to safeguard constitutional rights and bring suspects immediately to the prosecution agency. Only in exceptional cases did evidence need to be discarded because it resulted from extended (or extrajudicial) detentions.<sup>426</sup>

A middle position was taken by other interviewees from the HM state, who asserted that they did not have much awareness of the military's improper practices.<sup>427</sup> According to one, judges focus on the defendant's guilt and the offence charged, so they have no time to take notice of other aspects of the case. However, that same interviewee, in the context of a different question, mentioned that the army's performance was not entirely lawful; at times they harmed innocent people, people who were simply in the wrong place at the wrong time, and reported facts that did not coincide with what seemed to have actually happened.<sup>428</sup>

On the other side, interviewees from both the HM and the LM states described military abuses as much more frequent. For example: "If the army intervenes, criminals go away but, on the other hand, if they act, there are cases of torture and shootings".<sup>429</sup> Others said:

We have noticed violations, many constitutional violations... They are accustomed to respect orders and execute them. If their captain, sergeant

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<sup>424</sup> HM magistrate 3, LM appeals magistrate 1, LM magistrate 2, LM magistrate 4, LM first instance judge 7, LM magistrate 3.

<sup>425</sup> HM magistrate 3, HM magistrate 5, HM appeals magistrate.

<sup>426</sup> HM magistrate 4, HM magistrate 5.

<sup>427</sup> HM first instance judge 2, HM magistrate 3.

<sup>428</sup> HM magistrate 3.

<sup>429</sup> HM magistrate 1.



or commander says go in, break the door, then they [the soldiers] break the door, so that has affected society in a serious manner.<sup>430</sup>

Perhaps in the future they [soldiers] will be strongly criticised... we had stopped seeing cases of torture and extrajudicial detentions and now we see them... They bring the suspect to the prosecution agency 20 hours later... that was typical in the '70s... We are in an exceptional situation that has not been current for a while, torture, extended detentions [happening], and so constitutional protection is granted [to defendants]. The problem is their manner [of conducting investigations], they do not know how to take a statement or [safeguard] the other party's rights.<sup>431</sup>

Most operations in which soldiers participate culminate in the arrest of suspects. Nonetheless, according to interviewees from both locations, these detentions are riddled with abuses, such as forced confessions or de facto property searches. In those cases the defendant is granted constitutional protection by a constitutional tribunal and released. But this means that the defendant was previously convicted by lower courts who disregarded the military's abusive practices.<sup>432</sup>

According to interviewees, the soldiers' lack of training as civil officials and the discipline engrained in their training make them prone to committing abuses<sup>433</sup> for which they are not held accountable.<sup>434</sup> "If police officers are the first to violate human rights, members of the army are worse".<sup>435</sup>

Interviewees pointed out that military personnel tend to gather evidence and conduct investigation activities improperly, such as property searches. A judge from the HM state described several cases in which he believed soldiers had framed defendants and produced incriminating evidence, leading to convictions he then revoked.<sup>436</sup> For example, in one case soldiers took two young men to the prosecution agency for possession of a high-calibre firearm, an AK 47. According to the military, they were carrying the firearm in a very small car, a Volkswagen, and when they saw the soldiers they got out of the car with the

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<sup>430</sup> HM appeals magistrate.

<sup>431</sup> HM magistrate 1.

<sup>432</sup> LM magistrate 4, LM magistrate 5, HM magistrate 4, HM magistrate 5.

<sup>433</sup> LM appeals magistrate 1, LM magistrate 2, LM magistrate 4, LM first instance judge 7, LM magistrate 3.

<sup>434</sup> LM magistrate 4.

<sup>435</sup> LM magistrate 2.

<sup>436</sup> HM appeals magistrate.

weapon and ran away. However, this did not make sense to the judge. It was difficult to imagine two people getting swiftly out of such a small car with a 35-inch weapon and running away. Also, the defence produced several pieces of evidence to prove they were not carrying a weapon but rather heading to the house of a client who had asked for help from the drug rehabilitation association where the defendants worked.<sup>437</sup>

Another interviewee from the LM state described a case where he thought people were falsely accusing the military of breaking into homes and committing abuses in a different state where the military was also involved.<sup>438</sup> After seeing similar cases from other municipalities, he realised it was not a lie or an isolated event but rather a systematic practice. The army was using a drug detector called GT200, widely known as the “devil’s ouija board”. Soldiers pointed this detector at a house and it quickly determined whether drugs were kept inside, which would allow them to legitimately break in. Scientists from the Physics Department of the National University (UNAM) determined that the GT200 detector was as accurate as a flip of a coin (El País, 2013).<sup>439</sup>

A different judge from the LM state agreed with the military’s involvement in crime investigation and stated:

The army does not understand human rights, but on the other hand, we have a prosecution service that is 100 percent unreliable, as corrupt as could be. I would much rather have an institution with bad manners than an infiltrated one.<sup>440</sup>

Although comments and views on the army’s improper behaviour varied across locations and amongst judges, judges from the LM state coincided in highlighting unlawful actions by soldiers. By comparison, judges from the HM state varied widely: some interviewees described military abuses, others said they could not comment as had no knowledge or awareness of the matter; others described military abuses as exceptional. The diversity of opinions of judges in the HM state is interesting, bearing in mind that those judges had greater contact with the military and were immersed in a violent environment.

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<sup>437</sup> HM appeals magistrate.

<sup>438</sup> LM magistrate 2.

<sup>439</sup> This tool became famous for being particularly expensive and inaccurate in performing crime investigation tasks. At the moment of the interview, the SCJN and the National Commission for Human Rights (CNDH) were reviewing the legality of the detector.

<sup>440</sup> LM first instance judge 5.

## Judicial independence and impartiality

International consensus defines impartiality as a quality in judicial decision-making where a case is resolved without favour, bias or prejudice, while independence concerns deciding a case solely based on the facts and on legal reasoning, without concern for other parties, including other branches of the government. Judicial impartiality and independence are issues that merit a study in their own right. These themes were frequently referred to by interviewees from both locations, although they seemed to use them equally despite their inherent differences.<sup>441</sup>

Judicial independence and impartiality were topics discussed towards the end of the interviews. I sought to approach these issues after having built rapport with interviewees. To spark the conversation I asked: “in your opinion, did the president’s habit of referring to offenders as enemies and drawing on the military affect the judiciary in any way?” “Has insecurity affected the judiciary in any way?” Interesting views concerning the way judges view themselves and other colleagues were discussed, as well as impartiality and the way in which insecurity affects judicial decision-making. The judiciary’s independence was also addressed, and this topic is covered in the last part of this section.

### *Impartiality and judges’ ranks*

Interviewees from all ranks claimed that they analyse cases impartially.<sup>442</sup> However, several believed that fellow judges, in particular those from low-tier courts, lacked impartiality and objectivity.<sup>443</sup> For example, one interviewee mentioned that lower-tier judges are bound by the intermediate resolution to reach a final judgement. He noted that several judges had faced administrative complaints when the final verdict did not coincide with the intermediate resolution.<sup>444</sup> According to another, the way in which the parties behave during proceedings puts pressure on the judge, in addition to the media and strict

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<sup>441</sup> For instance, an interviewee explained that he attempted to remain impartial by not bonding with other practising lawyers and criminal justice officials, as well as by not attending training courses. LM appeals magistrate 1.

<sup>442</sup> HM magistrate 3, HM first instance judge 1, HM magistrate 5.

<sup>443</sup> A way of approaching issues of impartiality was asking interviewees about their perceptions of their colleagues or of the judiciary as a whole. It appeared to be an effective strategy to discuss the judiciary in general. However, these interviewees insisted that their answers were not by any means a general assessment but rather personal opinions.

<sup>444</sup> HM magistrate 4.

deadlines. All these pressures contribute to finding against the defendant.<sup>445</sup>

The judge is a human being who thinks and feels like anyone else. So the pressure from the press, at times, corners them [judges] or makes them be too cautious, and that goes against the defendant because ... the circumstances make the judge biased against the defendant, and that is why the majority of decisions are convictions.<sup>446</sup>

This interviewee explained that his opinion was based on his personal experience; he had worked in the federal judiciary for over thirty years and had been a first instance judge.<sup>447</sup> In his view, higher-tier judges, such as appeals magistrates or constitutional magistrates, decide cases with greater objectivity because they are not pressured by deadlines or immersed in trial proceedings.

### *Impartiality and the relevance of the written case file*

Throughout the interviews, judges mainly from the LM state discussed judicial performance and impartiality. Also, they discussed the relationship between judicial impartiality and deciding a case either based only on paper submission or reaching a verdict also informed by their interaction with the parties during proceedings. At one extreme, some interviewees held that examining all documents contained in the case file and using them to reach a verdict was the best road to an impartial decision.<sup>448</sup> Any initial prejudgements, moral considerations or personal views that could hinder an objective reading of the case would be eradicated by basing a decision solely on the documents contained in the dossier.<sup>449</sup> Whatever claim the parties might make was only significant if it had documentary support; all other allegations were unfounded and hence discarded.<sup>450</sup>

The fact that judges considered the written case files to be of paramount importance, even greater than human interaction during proceedings, resonates with how an expert on criminal justice described the “ideal judge” who rules on a case exclusively on the file, isolated from the people and events surrounding him.<sup>451</sup> Further, this commentary resonates with a ritualist judge who believes the

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<sup>445</sup> HM magistrate 5.

<sup>446</sup> HM magistrate 5.

<sup>447</sup> HM magistrate 5.

<sup>448</sup> LM appeals magistrate 1, LM first instance judge 8, LM first instance judge 4, LM first instance judge 5.

<sup>449</sup> LM first instance judge 8.

<sup>450</sup> LM first instance judge 4.

<sup>451</sup> Expert in criminal justice, Mexico City.

only criteria for reaching a decision are the accurate application of the law and precedents to a case, disregarding any aspects of the context and of the parties.

At the other extreme, several judges mentioned the relevance of observing how defendants and the rest of the people involved behaved in court proceedings such as cross-examinations or confrontation hearings. According to these judges, the fact that upper courts do not hold hearings and do not generally meet the parties may lead to unfair decisions. Interviewees discussed cases in which they felt they reached a fairer verdict after meeting the parties personally. These commentaries resonate with the adjudicator role discussed earlier, where the judge as an adjudicator is interested in settling controversies, taking into account each party's rights. Also, those commentaries reflect the mediator role where a sense of fairness is borne in mind to reach a solution.

The choice of deciding based on paper submission or on oral hearings has been examined elsewhere. According to a recent study by Thomas and Genn (2013) on judicial decision-making in the UK, case outcomes do not tend to vary according to whether the decision was based on written submissions or oral hearings. However, it was also found by this and other studies that oral hearings give decision-makers the perception of having received enough evidence and parties the perception of a fairer process. Further, oral hearings appeared to be more effective where evidence and credibility were in question (ASA, 2005; Richardson & Genn, 2007; Thomas & Genn, 2013).

The judge's participation in hearings was a theme raised in surveys of prison populations, in which prisoners insisted that judges tended to be absent during hearings to the extent that defendants often confused the judge with the court clerk or with other court officials (Azaola & Bergman, 2010; Azaola & Correa, 2012). A frequent explanation of the judge's failed attendance was excessive workloads (Azaola & Bergman, 2010; Azaola & Correa, 2012; Pásara, 2006). Could it be that workload is only one part of the explanation of their absence, and that judges choose not to be present during hearings because they believe their impartiality may be impaired?

If the second explanation is true, the new adversarial system, which demands that the judge be present during all court proceedings, will force judges to modify their understanding of impartiality. In other words, those who believe that decisions should be based solely on the case file will face severe difficulties when required to consider evidence that involves human interaction and reach an impartial verdict when public hearings are held.

### *Independence and insecurity*

In 2011, the U.N's special rapporteur on independent judges and lawyers reported that Mexican judges and other legal practitioners faced threats, intimidation, harassment and other forms of pressure. This pressure kept them from acting freely or truly independently. The rapporteur concluded that "the need to protect court officials from threats and intimidation is underscored" (2011, p. i, 12-13).

In 2012, the chief justice of the SCJN launched a new security programme to protect judges in high-risk locations, providing security personnel and armoured vehicles (Taniguchi, 2012b). By 2012, 98 members of the judiciary had been granted special safety protection; 78 judges made use of armoured vehicles and 20 used personal bodyguards. Also, working hours were modified in several states, including the HM state (Taniguchi, 2012a; Taniguchi, 2012b). The chief justice publicly acknowledged that criminals had attempted to threaten judges:

The work of judges during these times is very complicated due to the present situation in the country. Insecurity, violence, organised crime are all present; these are facts, true facts.<sup>452</sup>

The rise in drug-related violence paired with the increasing involvement of the military in criminal justice affairs help explain the measures taken by the chief justice. It is clear that these measures seek to safeguard judges and judicial impartiality and independence. Whether the measures described were sufficient to achieve their goals is difficult to ascertain. However, Begné Guerra (2007) found that high-profile offenders such as drug traffickers exert pressure on judges' impartiality, either by offering large amounts of money or by threatening their lives and those of their families. There are no official figures for the total number of threats, killings or other intimidation, but there are many crude examples. For instance, the third judge killed during President Calderón's administration was found outside the court building in 2006 (Begné Guerra, 2007). He had previously rejected the bid of Osiel Cárdenas, the leader of the Gulf drug trafficking organisation, to reschedule a hearing.<sup>453</sup>

The different levels of violence experienced in the examined states were illustrated in many ways. For instance, all federal courts in the LM are located in a single building and it is guarded by regular police officers. By comparison, lower-tier and higher courts in the HM state are located in separate buildings and levels of nervousness and stress among HM judges varied. Buildings that are

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<sup>452</sup> Press conference given on November 6, 2012. Consulted in Taniguchi, 2012b.

<sup>453</sup> Interview with former court clerk. September 2012.

home to the lower-tier courts are guarded by the army, possibly as a response to the ‘tense days’ experienced by criminal justice personnel when, for example, a grenade was found outside the building, which escalated tension among all practitioners. Or, every time a member of a criminal group was brought from remand to testify in court, everyone feared that a member of the same criminal group would try to free the prisoner or someone from a different criminal group might seek to kill him.<sup>454</sup> It was difficult to approach this theme, especially with lower-tier interviewees from the HM state.<sup>455</sup>

Conversely, the higher-level courts of the HM state, the courts of appeals and constitutional tribunals, are generally guarded by the police. Magistrates in these courts tend to have more contact with defendants’ families than with the defendants themselves. Relatives appear before the magistrates to learn about the case and to ask for lenient treatment for their relative. For example, one interviewee described how he held meetings with defendants’ relatives, even those popularly thought of as dangerous. Case file in hand, he went through the evidence against the defendant and the reasons why he faced a difficult case. The interviewee said that the relatives were grateful for his sincerity and showed no desire to retaliate.<sup>456</sup> Other interviewees from the HM state said that they had not personally suffered any threats or violence, despite the spread of violence across the state.<sup>457</sup>

One of the main aims of this project was to learn about any possible effects of context in judicial decision-making and judicial behaviour. To discuss this topic with judges was particularly difficult. To begin the conversation I tried different strategies, such as discussing the general context of insecurity or asking them whether judges play any kind of role in such a context.

Responses fell into three different groups: **FIRST**, judges are not influenced by their surroundings; **SECOND**, judges are affected by the environment; **THIRD**, judges are affected and adapt their behaviour and decision-making to the environment. As mentioned earlier, I found no significant difference between judges located in the HM state and those in the LM state, so their accounts are presented together.

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<sup>454</sup> Interview with the regional delegate of public defence attorneys.

<sup>455</sup> Also, I found that this topic was easier to discuss during informal conversations with possible interviewees when I first introduced myself and invited them to participate in the project, as opposed to during the actual interview. For example, one judge with whom I held an informal conversation said: “We were at war and the only way forward was to eliminate criminals”.

<sup>456</sup> HM magistrate 1.

<sup>457</sup> HM magistrate 1, HM magistrate 2, HM magistrate 3.

The first type of approach included commentaries that maintained that the judge's duty was solely to try defendants based on evidence contained in the case file, notwithstanding the context of insecurity. Their judicial role and task has remained unchanged, so they are still compelled to treat offenders equally, despite incriminatory allegations or pressure from the press or the prosecution.<sup>458</sup> Judges, according to interviewees, are bound to decide impartially and examine cases while remaining detached from society's enhanced demand for justice.<sup>459</sup> Judges are required to apply due process rules whatever the defendant's characteristics.<sup>460</sup>

Judges and court proceedings, according to a judge, should remain the same, including enforcing due process values, unless there is an official declaration of an exceptional regime and constitutional rights are suspended; in other words, that a state of emergency is officially declared.<sup>461</sup>

The description of judges devoted to deciding cases, setting aside any sources of pressure or public demands, mirrors the ritualist judicial role where judges are expected to decide only by applying the law and precedent to a case. These interviewees' descriptions also enhance the notion that judges should reach verdicts that safeguard the judiciary's impartiality and the integrity of due process rules while not getting involved in the context of those verdicts.

The second type of response claimed that judges were unavoidably affected by the environment. Interviewees mentioned in general terms that they could not remain oblivious to the country's delinquency crisis.<sup>462</sup> An interviewee held that social factors, including specific social problems and local crime rates, do have an effect on the judge.<sup>463</sup> According to another interviewee, judges work in a very complex landscape in which they have to meet society's expectations of seeing criminals behind bars, enforce due process rights and impose fair sentences.<sup>464</sup> He said:

You must be sensitive to ... both the defendant and society, as a way to balance social peace. We must be sensitive to society, decide and sentence with fairness.<sup>465</sup>

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<sup>458</sup> LM first instance judge 7, LM first instance judge 4.

<sup>459</sup> LM appeals magistrate 2.

<sup>460</sup> LM magistrate 5; HM first instance judge 2.

<sup>461</sup> HM first instance judge 2.

<sup>462</sup> LM first instance judge 2, LM first instance judge 3, LM first instance judge 5.

<sup>463</sup> LM magistrate 4.

<sup>464</sup> HM first instance judge 1.

<sup>465</sup> HM first instance judge 1.



Similarly, an interviewee described the judiciary as the branch of government preserving social stability in the current criminal landscape. The judiciary, he continued, in contrast to other branches of government, is hardly arbitrary, because a written record is kept of all actions, a record always available to be examined and criticised.<sup>466</sup>

A different interviewee mentioned that although the judge's duty leaves no room to classify or label particular defendants, "we are human beings, we are affected by specific ways in which offences are committed, and these influence the way a judge sees the defendant".<sup>467</sup>

Another judge, while discussing the legal regime on organised crime, described a case where the police had arrested nine suspects with no reason other than that they saw them as suspicious. After a 'tense interrogation' the suspects confessed to being part of the Zetas, a gang that had committed many serious offences including kidnapping and drug trafficking. The judge noted that if the police had not detained them on the spot despite having essentially no evidence, and had acted strictly according to human rights standards, they might not have been investigated at all.<sup>468</sup> He continued:

If one sees it from the social angle of human rights, 'What injustice to detain a person who did not commit any offence!'; if one sees it from the angle of fear that we have currently in society, one would say 'it's great that they were arrested because they were reorganising to continue to offend'.<sup>469</sup>

A different judge held that in his view many judges had bought into treating defendants within the legal frame of organised criminals, because judges feared these defendants could produce serious harm.<sup>470</sup> "In my view, they aren't responding solely to the case but rather to the whole war on drugs".<sup>471</sup>

Describing the judiciary as having significance outside criminal courts coincides with Levin's description of the ways in which judges contribute to defining "society's response to deviance, to social conflict and the need for striking a balance between liberty and order" (Levin, 1977, p.4). Moreover, the judicial roles underlying the comments described above mirror an interest in (or at least the dilemma of) how to influence the criminal justice landscape through their

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<sup>466</sup> LM appeals magistrate 2.

<sup>467</sup> LM magistrate 4.

<sup>468</sup> LM appeals magistrate 2.

<sup>469</sup> LM appeals magistrate 2.

<sup>470</sup> LM magistrate 4.

<sup>471</sup> LM magistrate 4.

decisions. Judges, as adjudicators, understand their role is to assist in reaching peaceful settlements in disputes and bringing fairness to society. Deciding a case therefore goes beyond settling a dispute involving claims made by two parties but rather requires judges to balance broader social issues.

The third type of approach included judges' descriptions on the different reactions to unsafe environments. For instance, an interviewee claimed that judges do not work to reduce insecurity; in fact, judicial scrutiny is even stricter in a context of high crime rates, because suspects' human rights infringements tend to be more frequent.<sup>472</sup> In describing judges' duties, this interviewee stated:

We are ready, always available, to review any irregularity and stop it immediately because that is our task; and now, with this insecurity issue, we are even more alert [to making sure] that all security measures are taken without violating fundamental rights. That is the stand of this court and it coincides with the majority of courts.<sup>473</sup>

A different judge held that judges actively participate in crime control:

We need judges who not only apply the law, plain as it is, but rather judges who also have a little bit of conscience, that they touch their heart in the face of a human reality, not a social reality. The social reality—it is true, we have high crime rates, the crime rate has increased, but I insist that we ought to see people as human beings, those involved in proceedings as human beings. Judges comply with the written law and lose sight of objectivity. Why do judges do so? As a repressive act and trying to comply also with a social objective, which is to repress criminality. But I think that is not the way. I believe in the other way.<sup>474</sup>

Interestingly, in this last account the interviewee describes fellow judges as mere appliers of the law. But by performing their judicial function as law-interpreters and ritualists, they are also pursuing the policy goal of repressing criminality and taking into account external aspects of a case such as the 'social reality' of high crime rates.

The diverging accounts provided by these two interviewees illustrate the opposing theses reviewed by Epstein et al. and discussed in Chapter 2, where one group of scholars maintain that the judiciary is even more vigilant to civil liberties restrictions, and other scholars argue that the judiciary endorses security policies and programmes which may compromise these liberties.

A different interviewee said that trying defendants charged for organised crime offences differed to some extent from trying regular defendants. Al-

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<sup>472</sup> HM magistrate 4.

<sup>473</sup> HM magistrate 4.

<sup>474</sup> HM appeals magistrate.

though the applicable rules were the same, the judge saw things differently; he felt at risk because the moment the defendant appeared in court he saw the judge and was able to recognise him physically. “You feel afraid of these people [referring to members of criminal groups] when they see your face, when taking their testimony”.<sup>475</sup>

When this judge faced dangerous offenders indicted for serious offences, including organised crime, he decided beforehand how proceedings would be handled so that the defendants would not be released from custodial remand.<sup>476</sup> That same judge described a case in which a prosecutor, after participating in a special proceeding, found a funeral wreath in her office; she was taken to hospital with a suspected heart attack. These threats, the judge continued, hinder impartiality, so judges need to gather more tools and be prepared to face these types of offenders.<sup>477</sup> He continued:

It is difficult to be an authority when these criminal groups have taken over the whole city...one tries them more severely because one is dealing with people who pose greater danger to society and to oneself...setting aside that one is a judge, one is also part of a society that is demanding safety.<sup>478</sup>

The judge’s reaction of remanding dangerous offenders to prevent future offending against anyone including himself resonates with Jakobs’ paradigm of incapacitation for a particular type of offenders for the purpose of preventing dangerous offending and providing safety to society. However, this commentary also illustrates a case where one may possibly agree with enemy penology in treating certain types of offenders in a more severe manner in light of the threat to one’s safety. The tension between remaining impartial and encountering people who have committed serious offences as part of a criminal organisation is also illustrated in this commentary. It seemed that external factors to the case—the funeral wreath—could have affected judicial impartiality; but how could anyone remain unaffected by that kind of threat?

The underlying judicial roles embedded in these comments point towards understanding judicial duties within a policy-maker or law-maker framework, in which the judicial function is envisaged to be one that influences policy through decisions made. At the same time, these comments highlight how these judges’ personal attitudes and experiences may have affected their decisions, either by

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<sup>475</sup> LM first instance judge 2.

<sup>476</sup> LM first instance judge 2.

<sup>477</sup> LM first instance judge 2.

<sup>478</sup> LM first instance judge 2.

limiting law-enforcement agents' abusive behaviour, by urging a lenient or humane treatment on offenders or by repressing criminality and incapacitating dangerous offenders.

Other interviewees explained that a judge's eyes naturally adapt to their environment.<sup>479</sup> For instance, one of them described how, in a particular drug trafficking area (Sinaloa), the sentencing practice of imposing the minimum punishment on dangerous or threatening defendants was a way of reducing possible retaliation.<sup>480</sup>

Another judge described how he adapted his legal reasoning when working in a border state where the quantities of drugs were much greater than in other regions of the country. Because he sometimes dealt with large quantities of drugs, he became less rigid in regard to the threshold established by law that linked the quantity of drug with intent to supply. For example, in cases where he had to determine whether intent to supply was demonstrated, although the confiscated drugs exceeded the legally permitted amount, he decided to presume the drugs were going to be used by the defendant within the next two or three days. In contrast, when he began working in the LM state, he noticed that his colleagues—within a collegial court—were treating petty drug dealers who carried low quantities of drugs as though they were dangerous high-profile traffickers. He began shifting the tribunal's criteria so that the amount wouldn't be the sole argument to sustain intent to supply and, if faced with doubt, the defendant had to be acquitted.<sup>481</sup>

In addition to adapting legal reasoning, interviewees discussed the risks involved when trying dangerous offenders.<sup>482</sup> One interviewee described a case where a defendant was involved in a gunfight with the military after having refused to stop at a checkpoint. The military started shooting at the suspicious car, and those inside the car, including the defendant, shot back. Once the defendant was in custodial remand he asked the interviewee, who was visiting the prison, why had he decided to hold him in remand. The judge answered that he had found legal reasons to try him and hence decided to keep him in custodial remand during proceedings. The judge soon discovered that the defendant appealed the intermediate decision and the upper court released him; the judge feared retaliation but said this was part of the job.<sup>483</sup>

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<sup>479</sup> LM magistrate 3, LM magistrate 4.

<sup>480</sup> LM magistrate 3.

<sup>481</sup> LM magistrate 4.

<sup>482</sup> LM magistrate 3, LM first instance judge 2.

<sup>483</sup> LM magistrate 3.

The effects of unsafe environments may lead judges to alleviate society's demands for safer conditions by punishing dangerous defendants more severely. It may also be the case that judges feel they actively contribute to providing safer conditions by convicting defendants, in light of the fact that the press portrays defendants as already guilty, and if defendants are acquitted the media strongly criticises judges. The fact that the interviewed judges are aware of society's distrust in the judiciary may contribute to this reaction. It is feasible, though, to consider that judges, like any other officials, have a genuine concern for their own safety and that they react to their context, particularly considering the many cases of murdered and threatened judges across the country.

### *Judicial impartiality and other branches of power*

In September 2011, on his official website, former president Calderón commented on the release of a former high-profile official of the Federal Electric Commission, who had been indicted for obtaining unlawful enrichment of more than 33 million pesos. In the commentary, Calderón announced he was tired of the impunity caused by judges who freed criminals based on technicalities. The statement stirred the atmosphere within the judiciary and led to several public statements, including by the CJF and a justice of the SCJN, defending the judiciary and explaining the specifics of the case in question (Aranda, 2011; Méndez, 2011). A counsellor for the CJF stated:

To question the work of judges, without legal grounds and without evidence, impinges on national stability. We strongly oppose statements made against judges without sufficient evidence to sustain them (quoted in Aranda, 2011).

I asked interviewees for their opinion on Calderón's statement in order to initiate a conversation about judicial independence in relation to other branches of power. This question broadened the conversation to discuss whether the president referring to criminals as society's enemies had affected the judiciary. An interviewee mentioned that some judges had been influenced by the president:

I do believe [the discourse] has influenced some judges; if the words 'drug case' or 'organised crime' are written in a case file, they are enough for the judge and prosecutor to be predisposed to determine whether a person poses great danger.<sup>484</sup>

This interviewee expressed the view that judges were affected by the former president's discourse. By comparison, other interviewees explicitly asserted the judiciary's independence and judges' adherence to the Constitution and legisla-

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<sup>484</sup> LM magistrate 4.

tion. They avowed that human rights had not been affected and the judiciary had remained impartial, deciding cases lawfully.<sup>485</sup> For instance, a judge stated:

[The president's discourse] has not made any kind of impact. We are an independent power; we stand on a different rung; the defendant has the right to have his file examined by us and find whatever may benefit him.<sup>486</sup>

The general notion of all judges standing distant and independent from politics was similarly stressed by another judge:

All judges think in the same way. We stand apart from the executive, very respectful of power and public policy, but our duty is different, so I have not seen any change... Judges have been and continue to be judges, and are acting well. And concerning any infringement found [in court], there are tribunals that review them, and such infringement is corrected, but I do not see changes, because that is the perception that I have as a judge, due to the essence of my duty and for what I am. But I am sure that judges of all tiers or ranks think similarly, because that is the nature of our duty. Any judge who is thinking of aligning to a public policy, a political party, a party's policy, is distorting his duty, and I don't think there are any of those.<sup>487</sup>

This last commentary illustrates the widespread rejection of judicial behaviour that influences policy or politics in any way. In fact, this interviewee holds that he, like all his colleagues, understands the judicial role as being detached from politics and policymaking; behaving otherwise would cause a distortion of the judicial function. Thus, this interviewee shares the notion that judges are and ought to be ritualists and law-interpreters with no involvement or interest in affecting policy but rather being devoted to deciding a case based on its merits.

That same judge also stated:

The good thing is that in our country we are autonomous, nobody interferes with us, they respect us, the military, the local authorities, our bosses. Nobody interferes with us, we have autonomy, independence, we can decide with certainty and courage.<sup>488</sup>

The quotations above appear to advocate for the assertion of judicial independence. According to Baum, judges are interested not only in good policy but also in reasserting individual or social approval and validation at the moment of judicial choices and public statements (2006). Perhaps, then, these interviewees were addressing public criticisms and scepticism, reinforcing judges' social

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<sup>485</sup> HM magistrate 3, HM first instance judge 1, LM appeals magistrate 1, LM first instance judge 7, LM first instance judge 1, LM appeals magistrate 2.

<sup>486</sup> HM magistrate 3.

<sup>487</sup> HM magistrate 4.

<sup>488</sup> HM magistrate 4.

identity both inside and outside the judiciary as being fully devoted to upholding due process principles and standing separate from other powers.

Many interviews revealed constant attempts to reassert judicial authority. For instance, an interviewee stated that it was the judge who determined whether the defendant was guilty as charged and subsequently sentenced him, as opposed to the military acting beforehand.<sup>489</sup> Another judge noted:

We cannot be influenced, should not be influenced by the parties or by the president's recommendations, not even by recommendations from the president of the Supreme Court. We have to have impartiality and not be influenced by other situations because [ultimately] the responsibility lies with the person who signs [the judgment].<sup>490</sup>

It would seem that judges struggle to maintain their independence and authority in the face of different sources of pressure. Some interviewees agreed that there were many examples of external pressure from other branches of government. A judge described how he and several colleagues were summoned to the president's official residence. There, according to the interviewee, they were told to be "tough on narcotics". His fellow judges only smiled, thinking, you may speak what you will, but that will not dictate the way we decide.<sup>491</sup>

Interviewees mentioned a particular event in which members of the military broke into a judge's home. One interviewee described how a person in the house confronted the soldiers and said: "This is the home of a federal judge!" and their reply was, "we only respond to the president's orders". Later on, the military publicly apologised and claimed to have broken in "by mistake", alleging they were supposed to break into the neighbour's house.<sup>492</sup>

Specific cases were also described; for instance, a judge mentioned it was common knowledge that one court had been officially searched and case files examined.<sup>493</sup> Another interviewee described how he faced a criminal lawsuit for obstruction of justice after he decided against the Attorney General's of-

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<sup>489</sup> This commentary was given by the interviewee in the context of explaining that he sees the defendant as an innocent person until the final verdict is issued. HM magistrate 3.

<sup>490</sup> HM appeals magistrate.

<sup>491</sup> LM appeals magistrate 1.

<sup>492</sup> Although several interviewees from both the LM and the HM states mentioned this event, detailed information was given by an interviewee during the informal conversation. He mentioned this event in the context of his views on the currently empowered military within criminal justice institutions across the country, and on the credibility judges have with the military.

<sup>493</sup> LM first instance judge 1.

fice.<sup>494</sup> A different interviewee said: “I would like to see the brave one who decides against the prosecution”.<sup>495</sup> The type of harassment available to the executive branch was described by Pásara in regard to the state prosecution (2006). According to members of the local judiciary in Mexico City, there is a credible threat that they will face a criminal lawsuit if they decide against the prosecution (Pásara, 2006, p.42).

Judges commented on the harm done by the president’s public claims that judges were releasing criminals. This sort of claim, they said, damages the public image of judges and undermines their credibility. It was at best an over-generalisation and at worst an entirely false image. It created a negative public opinion towards the judiciary which was presented as corrupt, negligent and inept.<sup>496</sup> Another said that the president’s declarations were futile attempts to have the judiciary validate irregular actions made by the prosecution.<sup>497</sup>

Throughout this research, federal judges indicated that the prosecution intimidates judges by threatening to file a criminal lawsuit or using other strategies to pressure them. State judges interviewed in Mexico City made similar commentaries. This overlap of accounts seen in different courts, locations and periods of time indicates the presence of systematic as opposed to occasional practices carried out to influence judicial decision-making. Different forms of intimidation, such as breaking into a judge’s home at night or filing a criminal lawsuit, are as threatening to independent judicial decision-making as other forms of violence. At the same time, the environment was characterised by the president’s and other public officials’ statements calling for unity to face those who threaten the safety of Mexican institutions. It would seem that the obverse of the president’s call for unity were the public complaints against judges who ruled against the executive branch of government, paired with other forms of pressure including breaking into their homes; ultimately, “whoever is not with me is against me”.<sup>498</sup>

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<sup>494</sup> Mexico City *arraigo* judge 1.

<sup>495</sup> LM first instance judge 5.

<sup>496</sup> LM appeals magistrate 2, LM first instance judge 7.

<sup>497</sup> LM magistrate 5.

<sup>498</sup> Luke 11:23.



## Discussion and preliminary conclusions

### *General findings*

The main purpose of this chapter was to explore judges' reactions to the landscape of enemy penology, particularly promoted by the military's participation in public safety activities and by public officials' statements about the safety crises faced by the government. Questions of judicial impartiality and independence were of interest, as well as learning about how judges cope in such a challenging environment.

It was found that the involvement of the military has not signified a change in the way in which court proceedings are conducted in either the HM or the LM state. Also, it was found that judges' opinions on the military's behaviour differed; while most judges from the LM state agreed that the military's practices were inappropriate and illegal, opinions in the HM state varied. Judges discussed the themes of impartiality and independence from different angles, touching upon judges' ranks, judicial decision-making based on paper submission versus oral hearings, insecurity and independence. The various opinions and commentaries did not signal any relationship with the judges' location. For instance, the vast majority of interviewees from both states held that the judiciary was an independent branch of government, and interviewees across locations mentioned ways in which judges have experienced pressure from the executive branch, including from the military and the prosecution, which put their independence to the test.

It appeared that judges perceive their role in a wide variety of ways. For some, judicial duty means disregarding any external aspects of a case in order to reach a verdict; for others it implies to 'repress criminality' or to safeguard and enforce human rights; for yet others, it means to preserve social peace. The underlying roles that judges seemed to embrace included ritualists, adjudicators and policy-makers, and their decision-making roles ranged from law-interpreters to law-makers.

### *Striving to obtain internal consistency*

According to cognitive dissonance theory, people constantly strive for internal consistency in the face of dissonance, that is, when different feelings, beliefs or opinions do not fit together. This inconsistency can be resolved by changing one's behaviour or changing or distorting one's perception of the information (Festinger, 1962). Judicial duties and social expectations may have been difficult to reconcile with the new circumstances. For example, it may be unrealistic to hope to remain impartial and set aside the violent environment when

deciding the guilt of a defendant who belongs to a dangerous gang. Similarly, it may be challenging to reconcile holding soldiers accountable for extracting confessions from members of drug gangs while welcoming their assistance in restoring safety and order.

The wide difference of opinions concerning how to perform judicial functions in unsafe environments reinforces the notion that judges' self- and social expectations differ widely. However, it may also indicate that judges are, more than ever, striving to make sense of the context and their role in it, while upholding judicial values, including impartiality and objectivity and also, more recently, human rights.

The opinions shared by judges touched upon several judicial roles. Some comments fitted a ritualist role, where judges held that they must not take into account any external factors when deciding a case but reach a verdict based on the case file alone. Other opinions seemed to share the adjudicator and mediator roles, where the judge is seen as a key player in resolving disputes but seeks to foster social stability and peace rather than simply deciding a case. Other views appeared to be closer to a policy-maker and law-maker role, where judges promote or reject practices such as safeguarding human rights, restraining the military or repressing criminality. At the same time, adapting legal reasonings to particular environments in order to protect judges' own safety revealed a pragmatist role, where the resolution of a case does not pursue policy goals or an accurate interpretation of the law but rather a solution acceptable to that particular judge.

Interviewees also claimed that judges are, but ought not to be, influenced by their environment while performing judicial functions. This perspective draws on the legalistic approach, which understands judicial behaviour in terms of accurate law and precedent interpretation and rejects any judicial influence on policies or politics. Ultimately, as mentioned in earlier chapters, the Mexican judiciary institutionally embraces the legalistic model, together with the ritualist and law-interpreter roles, in which the environment is not expected to affect judicial performance.

To downplay the role of violent offending, militarisation or personal threats may be part of the ritualist and law-interpreter role that every judge is expected to adopt. It may also relate to what is described as 'the elephant in the room', in which people attempt to ignore or deny the uncomfortable or even dangerous situation in which they find themselves (Cohen, 2012). Or perhaps a meta-rule exists within the judiciary that states that no-one may admit or deny the existence of dangerous environments, as this could be understood as judges failing to perform their duties appropriately.

### *Safeguarding independence*

Judges are pressured in several ways. Any decision issued against the prosecution (e.g. an acquittal) unleashes a set of problems. Judges are aware of the prosecution's power to file criminal lawsuits against judges. In addition to the threat of being indicted, members of the federal judiciary have been openly harassed by the military in their courts and homes. Judges faced open criticism from the former president for fostering impunity, criticism backed up by the media, which portrayed defendants as guilty and judges as inept, corrupt and collusive whenever acquittals were issued. This pressure increased the judiciary's lack of social credibility and questioned its authority and legitimacy.

At the same time, indications found here suggest that judges are also harassed by violent defendants. This was corroborated by Begné Guerra (2007, p. 53). In this context, the Chief Justice programme heightened security measures to protect judges. This need was also stressed by the U.N.'s special rapporteur on independent judges and lawyers.

Despite the fact that the environment is filled with various sources of pressure against the judiciary, judges described themselves as an independent branch of power that stands separately from the government. Judges said they should not and do not follow recommendations from anyone, including the president or the chief justice of the SCJN. Based on the judgements and accounts analysed throughout this thesis, judges appeared not to endorse the president's policy of declaring war on organised crime as part of the enemy penology context. In fact, judges in challenging locations appeared to decide cases in a similar way and share views similar to judges located in a relatively safe place. In sum, the judiciary appeared to be insulated from the environment, reflected in: views that reinforce ritualist and law-interpreter roles, uniformity of judgements, strict adherence to binding and non-binding rulings and in a general legalistic approach to understanding judicial behaviour.

This insulation could be understood as a strategy used by the judiciary to shield itself from external pressure and influence, particularly from the executive branch. It must be borne in mind that until recently, the president faced no substantial resistance from the judiciary, which tended to endorse policies promoted by the government. At the same time, the judiciary lacked any substantial jurisdiction duties to invalidate the government's policies.

Notably, the public statements defending the judiciary from the president's accusations emphasised that unfounded allegations against judges affected social stability. Portraying judges as contributors to social stability may be understood as a strategy to distance them from the parties involved in disputes, including a government seeking to enforce enemy penology policies.

Judges are currently caught between competing demands that put their independence and impartiality to the test. They feel the pressure of society's anxieties about rising violent crime and demands for greater safety. Judges are aware of government demands for more effective and harsher punishment for criminals, as well as the constant threats to the safety of judges and their families, not only by criminal groups but also by the government. Also, judges are now required to safeguard due process and human rights. These tensions illustrate the complicated context in which they find themselves.

Ultimately, the variety of views and comments expressed by interviewees reveals a colourful and multi-layered but still murky image of the Mexican judge: a public official attempting to honour goals such as impartiality and independence while coping with challenging environments that put that independence and impartiality to the test. At the same time, these challenges overlap with legal and institutional reforms that ask judges to apply new principles and also see the judicial role differently.



## Discussion and conclusions

### Introduction

The question at the heart of this thesis was whether Mexican judges were applying an enemy penology model in the process of trying drug offenders in the midst of the ‘war on organised crime’. Government discourse—especially that promulgated by former presidents—framed criminals as enemies who merited a military response from the criminal justice system because of the grave risk they posed to society. It was clear from existing evidence, reviewed in the early chapters of this thesis, that an ‘enemy penology’ model was promoted actively by the executive. Officials in security and criminal justice relied heavily on the military to deal with organised crime groups, characterised as enemies, not only in combat but also through their role in crime investigation. This raises the question: were judges treating defendants as enemies, reducing procedural safeguards to facilitate convictions and imposing disproportionate punishment to eliminate them from society?

The idea that the enemy penology model was being ratified by the judiciary seemed plausible for several reasons. First, the federal judiciary began, from the 1994 reforms onwards, to build on its independence from other branches of government, a policy that signified the judiciary’s intention to decide cases in politically relevant ways and to act as an arbiter within politics. Prior to the 1994 reforms, judges’ jurisdiction was limited to cases that were irrelevant to political life and did not question the authoritarian regime. The judiciary’s independence from the executive and its crime control policies is thus relatively recent, and the current landscape appears to be putting the judiciary’s independence to the test. A second reason to suspect that the judiciary was endorsing an enemy penology paradigm was based on several decisions, discussed in Chapter 3. In the first of these decisions, in 1996, the *scjn* agreed with the involvement of the military in public safety matters; in 2000, it ratified this decision and authorised the president to rely on the army for public safety affairs without declaring an official state of emergency. The *scjn* also decided—though not unanimously—that the *arraigo* complied with constitutional stand-

ards and therefore authorised the executive to use it as an investigative tool.

A third reason to expect judges to be affected by enemy penology was related to the state of war experienced in some regions of the country, including the HM (or highly militarised) state. In these regions, levels of violence related to drug trafficking suddenly peaked, causing society's anxiety and need for safety and control to grow. At the same time, the military's intervention in criminal justice affairs expanded while public officials made repeated statements stressing the need to declare war on drugs. In these circumstances, it was in my view a sound hypothesis that these events might affect judges, particularly those in direct contact with offenders. Based on this hypothesis and on the inability to conduct a longitudinal study on the judiciary that explored the 'before and after', the research sought to compare judicial performance in a HM state in a hostile or warlike environment and a LM (or less militarised) state in a safe or unchanged one in order to examine the extent to which judges might be reproducing the enemy penology paradigm.

Based on an analysis of judgements in ordinary drug offences and interviews with judges, the broad answer to the research question is: judges are not reproducing an enemy penology model in either location. The evidence suggests that the judiciary has successfully limited the punitive and militaristic ethos of current criminal justice policies in Mexico. The conclusion that judges in both places treated the defence and prosecution in the same manner was borne out by both the analysis of written judgements and interview data. Judges continued to try all defendants as ordinary offenders, and the fact that some defendants could possibly be involved with dangerous criminal groups did not result in any visible change in the trial or the sentence. Judicial reasoning, articulated in written judgements, was broadly similar in both locations. Sentencing was also remarkably similar, and in both places the general tendency was to impose minimum sentences. Conviction rates were equally high in both places. The overarching conclusion is that judges in both unsafe and safer environments try cases in a similar manner, apparently insulated from the sharply divergent contexts in which they work. The arguments advanced and the sentences imposed were strikingly similar. The evidence suggests that the judgements issued are highly standardised, arguably based on templates that enhance uniformity, consistency and legal certainty, all of which provide deeper understanding of the Mexican judiciary.

The uniformity embedded in judgements, along with the institutional goals of consistency, continuity and legal certainty, illustrate several aspects of the Mexican judiciary. First, the judicial bureaucracy enforces and promotes these goals by exerting control over trial courts through reversals and strict adher-

ence to precedent. Second, formalistic and legalistic judicial behaviour, visible in both judgements and interviews, reflects that judicial duties are confined to deciding cases, based on the law's correct application and interpretation. Further, it was found throughout the interviews that some judges embraced judicial roles such as the ritualist or the law-interpreter, in which roles they committed themselves to disregarding external aspects of a case, ruling without consideration of politics, ideology, policy or personal attitudes.

## Is the judiciary reproducing an enemy penology model?

### *Treating defendants as enemies?*

Defendants appeared to be seen by the judges as nothing other than defendants. For the judges, defendants were criminals requiring criminal justice intervention rather than enemies who could be eliminated. The vast majority of judges maintained that they see defendants as ordinary people, mostly from vulnerable backgrounds, lacking basic necessities and with few opportunities. It appeared from judgement analyses that most defendants have a low income and many have problems with drug abuse. At times, judges described defendants as victims of circumstance, products of their impoverished upbringing. Some judges from the HM state described defendants as victims of a criminal justice system geared towards convicting them, giving them a low chance of being acquitted.

According to a high court interviewee from the LM state, his colleagues in the LM state see all drug offenders as large-scale drug traffickers. No judge from either the LM state or the HM state made a similar comment. However, defendants from the LM state appeared to be petty criminals who, despite carrying significantly lower quantities of drugs than defendants in the HM state, were treated and convicted similarly to those from the HM state. Judges from the LM state described dangerous criminality, and some interviewees distinguished ordinary defendants from highly organised, skilled and literate criminals. Interviewees from the LM state claimed these skilled criminals ought to be treated with a separate set of rules. Whether this implies that some criminals ought to be treated as enemies cannot be ascertained, as no other source of data corroborated this.

Overall, no significant difference was found in how judges from the HM state and the LM state viewed defendants. Few traces of enemy penology were found in the ways in which defendants are seen by judges.

### *Reducing due process safeguards? (presumption of innocence)*

I sought, throughout the analysis of judgements and interviews, to establish whether judges were reducing due process standards in order to facilitate convictions. I used presumption of innocence as a yardstick to measure a possible reduction in procedural rights. I found that presumption of innocence is hardly ever upheld, regardless of where the trial took place. Several indications drawn from the data may explain this.

FIRST, Mexican criminal proceedings have consistently had a conviction ratio of 90 per cent. Although conviction rates are a complex matter and are shaped by the particularities of each system, it is difficult to match the successful ratio reflected in the high conviction rate with the systematic criticism of the prosecution's performance, generally described as being negligent, inefficient and corrupt.<sup>499</sup> At the same time, all cases to this date proceeded to final judgement, by comparison to other systems where a great number of cases are settled before reaching court. This suggests that the prosecutor wins cases despite failing to prove the case beyond reasonable doubt, making it difficult to maintain that defendants were found guilty beyond reasonable doubt and were presumed innocent throughout the proceedings.

SECOND, an inquisitorial role can be traced in judicial practices where the main aim is to find the truth of the matter. Judges were said to frequently supplement evidence in order to issue a sufficiently grounded decision rather than letting defendants go because of insufficient evidence. Supplementing may come in various forms, including holding further hearings or seeking additional insights through close observation of parties during proceedings. Also, concerns about impunity were raised, to the extent of taking into account the chance of re-arresting a defendant, when deliberating on the verdict. Although judges may not fully embrace a crime control role, seeking additional evidence indirectly implies they prefer to amend the prosecution's case instead of finding the defendant not guilty due to insufficient evidence.

THIRD, guilty verdicts are simply much easier to issue, given the stress judges face both inside and outside the judiciary. Acquittals cause distrust and scepticism among peers and across hierarchies within the judiciary. In parallel to the pressure judges face to convict, they are pressured by various actors. Public officials from the executive branch put pressure on judges in three ways: by publicly claiming that judges contribute to impunity, by threatening them with criminal

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<sup>499</sup> For instance, the Ministry of Justice of England and Wales explained that the fall from 83 to 82 percent of the conviction rate was explained by a number of factors difficult to identify separately including: changes in guilty plea rates, mix of cases handled in and out of court, impacts of operational changes, among others (2014, p. 12).



charges, and by intimidating them in their courts and homes. The media portrays defendants as guilty before the actual verdict has been determined, reducing judges' authority. This, along with society's general distrust of the judiciary, make a not guilty verdict more burdensome on judges.

FOURTH, the analyses of court judgements shed light on a series of binding and non-binding rulings frequently used by courts that mostly contain guidance on weighing evidence. For instance, rulings that instruct judges to give more weight to police evidence were often referred to. Also, rulings that authorise sustaining a verdict on indirect evidence were frequently used in cases of possession with intent to supply, where judges lacked solid evidence but verified the intent with circumstantial evidence. Arguments stressed in these rulings were quoted by judges and also expressed as their own. The power that stems from these rulings, and from those who issue the rulings, shapes the way judgements are explained and also the final outcome.

The principle of presumption of innocence appeared to be applied precariously; defendants hardly stand a chance when brought to court. The discovery that Mexican judges routinely presume that offenders were criminally responsible and that convictions are facilitated, overlaps with enemy penology's values of presuming suspects' dangerousness from the start and also of facilitating convictions. However, this overlap signposts inquisitorial practices that were traced in judges' accounts, judgements and rulings, rather than the incorporation of enemy penology values. These practices concern the evidence-supplementing role played by the judge and the precedents that together presume the prosecution's case establishes the truth of the matter. In addition, the entrenched practice of presuming offenders guilty—because why else would they be brought to court?—overlaps with the pressing need expressed by some to reduce impunity and the general context of increased violence and criminality. Concerns about impunity were also found in judgements, which suggests that judges worry about crime control.

The fact that the large majority of defendants are found guilty was already well known (Carbonell & Ochoa, 2009). This research has traced the range of arguments systematically used by first instance courts and enhanced by higher courts to convict defendants. The research discovered that these arguments originate in rulings that encourage uniform judicial decision-making. Hence, the general pattern of convicting defendants results from systemic behaviour within the judiciary. This general pattern indicates that templates which include referencing particular rulings are a policy promoted within the judiciary that foster uniformity. This policy helps with managing workloads and avoiding reversals while discouraging creative interpretation. Also, it reinforces the

understanding of judicial behaviour in terms of a formalistic and legalistic model, in which accurate law and precedent interpretation are rewarded and decisions drawing on other factors such as ideology, personal values and policy goals are prevented.

In addition, this research has produced an interesting variety of accounts from judges trying to make sense of this general pattern. Their comments range from maintaining that this principle is adequately applied to hoping that the new system will make it effective. Others hinted at what may keep judges from applying the new system. It would appear that the presumption of innocence principle is beginning to sink in into the judicial mindset, but this principle is difficult to align with other aspects of the current criminal justice system, which is geared to presume defendants guilty from the start. There are three reasons for this difficulty. First, the current system gives more weight to the prosecution's evidence, forcing the defendant to prove his innocence. Second, there is little room for acquitting defendants based on insufficient evidence, given the current judicial practice of supplementing evidence and of concerning about impunity and crime control. Third, external factors such as public claims, judicial audits, media pressure, strict deadlines, excessive workloads and the general unpopularity of acquittals make it even harder for judges to presume defendants innocent.

### *Disproportionate sentencing?*

Judges in both the HM and LM states consistently tended to impose custodial sentences of the lowest possible length on drug offenders. This finding should be seen in context; the changes in drug offences legislation in 2009 affected the sentencing tariffs for drug offenders, including drug users and small-scale drug dealers. The sample of judgements analysed included cases that were decided under the previous legislation, which contained more severe sentences, and others where sentences were lower, based on the new legislation. It was interesting to note that judges preferred to give minimum sentences despite these changes, even when custodial sentences were reduced and when parole became easier to grant. The preference for minimum sentences was also observed in cases where defendants faced more than one charge or were arrested for carrying several types of drug. Sentences were increased as dictated by law but to the minimum possible. Overall, it would appear that minimum sentences are imposed almost by default.

The defendant's rehabilitation and reintegration into society was a desirable goal, according to the vast majority of interviewees. Whether this was in fact accomplished is beyond the scope of this thesis, but the rehabilitative ideal em-

bedded in the Constitution is shared by all. To aim at eliminating defendants as a way of securing society's safety was definitely not present in judgements and was only mentioned by a few interviewees. They claimed that only specific types of defendant—recidivists and thugs—should be kept away from society as a way of minimising risk. Therefore, enemy penology was not traced in sentencing practices in the analysed judgements or the opinions judges shared in either of the examined locations.

Given that minimum sentences appeared to be the general rule, the discretion exercised by federal judges concerning sentencing appears to be void or simply cosmetic. The fact that they are generally inclined to impose sentences at the lowest end of the tariff raises several questions. First, federal judges prefer minimum sentences, which, according to an interviewee, reflects a humane attitude. What can possibly be held against a judge who imposes the minimum punishment? Could prison conditions, described as essentially inhumane, support leniency? Are lenient sentences preferred because of inertial convictions? Are they based on arguments already made, or generalised custodial remand? These are questions I have not addressed, but what this thesis has shown is that minimum sentences are widely accepted. In fact, changes in drug sentencing laws corroborated the fact that minimum punishment is preferred even when the periods of imprisonment were lowered. This means that judges' constant preference for minimum punishment cannot be explained by the general severity of Mexican sentences.

Managerial reasons may better explain the general practice of imposing minimum sentences. Judges who impose the lowest-possible sentence are exempt from being required to explain their reasoning, according to several rulings issued by the SCJN. By contrast, those who punish a defendant with a higher sentence are required to explain thoroughly what led them to opt for more severe punishment in order to avoid a reversal. The workload and the chances for a reversal are both reduced if minimum punishment is granted. The ruling issued by the SCJN clearly lightens heavy judicial workloads by exempting judges from further legal reasoning. Guaranteeing unchallenged decisions encourages judges to opt for minimum punishment to the extent of disregarding the case's specific circumstances or sentencing aims. The clear tendency to hand down minimum sentences calls into question the exercise of judicial discretion and its relevance in administering appropriate punishment to those found guilty. Undeserved leniency and severity are equally undesirable.

A judge mentioned that in unsafe environments, such as in the HM state, minimum custodial sentencing allows judges to navigate between convicting dangerous defendants and looking out for their own safety. This was only men-

tioned by one interviewee, but he described it as a predominant practice in one specific unsafe and large-scale drug trafficking region. This was corroborated to some degree by judgement HMC15, where an overtly dangerous defendant received only minimum punishment. Perhaps in challenging environments discretion in sentencing is useful to ensure judges' safety. It signals, however, that judges may be forced to use informal means to guarantee their safety because they lack formal methods of protecting themselves.

## Is the judiciary restraining the executive's security programme?

An essential follow-up question to the main enquiry of this research was whether the judiciary was reproducing or limiting the repressive criminal policy of enemy penology when trying cases. Hence, judicial independence from the executive's policies—and pressure—was discussed during interviews. Evidence from judgements also provided interesting though contrasting information.

### *Case files*

The claims made by interviewees that the judiciary is autonomous and fully independent of the executive stand in contrast to the vast majority of judgements, which ended with guilty verdicts and also appeared to endorse crime control aims pursued by the prosecution, police and military.

Prosecution cases were noticeably standardised in all the judgements analysed. The sources of evidence used by the prosecution were generally visual inspections of drugs, toxicology reports explaining whether the quantity of drug exceeded what the defendant could use individually, plus reports and statements produced by the police. All of these were produced during pre-trial proceedings, where a prosecutor faces minimum oversight. By comparison, the prosecution during trial, under a judge's supervision, appeared to produce hardly any evidence. As a result, the pre-trial evidence is used by the judge to reach a verdict, even if witnesses failed to appear in court to corroborate their statements. This means that courts rely on evidence produced unilaterally and uncontested by the defence.

A second characteristic of the vast majority of judgements was that courts tend to validate evidence produced by law enforcement agents during pre-trial. This evidence aims to demonstrate the way in which the arrest took place and, more importantly, the way in which the offence was committed. At the same time, procedural rules establish several requirements that witness evidence, including police statements, must meet.

It was found that all judgements failed to show any sort of assessment of

whether the police complied with these requirements. On the contrary, judges appeared to presume that the requirements were met by default and thus granted police evidence full credibility. This was observed in all cases, including those with obvious discrepancies between the versions of the facts offered by the police and the defence, giving greater credibility to the police than to defence witnesses. This shows that the version of the facts that prevails is that produced by the police, as also found by Pásara (2006). The police version prevailed even when several defendants made claims of mistreatment against the agents who arrested them.

In addition, courts appeared to weigh police evidence favourably by default. This may stem from indications contained in the rulings constantly referred to and quoted in judgements, which hold that police evidence should be taken as independent and that it should be given complete credibility if it was produced just after the criminal events and spontaneously. In sum, binding rulings ratify uncorroborated and unscrutinised evidence and give the prosecution and police greater benefit of the doubt. Failing to hold police statements to the same strict standards as defence evidence favours the prosecution.

It is difficult, however, to claim that this is a sign of judges endorsing the executive's policy of declaring war on defendants. In fact, this pattern probably emerged long before the president's policy. It would rather appear that the judiciary tends to endorse the executive branch, i.e. the prosecution, despite the war declared by the former president against criminals. Siding with the prosecution may be a legacy of the Mexican inquisitorial system, together with the fact that the judiciary was controlled by the executive until recently. In this regard, the independence and autonomy that allegedly characterise the judiciary were not traced in the judicial decision-making in first instance judgements.

### *Interviews*

Conversely to what was observed in judgements, during interviews judges described themselves as autonomous and independent. They said they heard cases without anybody indicating the way in which the case should be managed and decided. Nonetheless, judges are currently facing various forms of pressure that put impartial and independent judicial decision-making to the test.

Judges talked about feeling threatened by the prosecution, which can initiate legal action against judges who decide against the state or subject them to mechanisms that make workloads unbearable. Another way to put pressure on judges was through intimidation by the military. Several interviewees made reference to a case where a judge's home was 'unintentionally' searched or where courts were searched to extract case files. Some interviewees stressed that sol-

diers are usually respectful to judicial authority, while others mentioned ways in which soldiers defied or underestimated judicial decisions and authority.

Public statements claiming judges release criminals and foster impunity are also forms of harassment. Some judges criticised these claims as false, undermining the judiciary as a whole. Only a minority of interviewees held that some judges gave in to the pressure to the extent of bearing in mind the war on organised crime when deciding each case.

In sum, through the judgement analyses and the accounts shared by judges it was found that judges are not reproducing an enemy penology paradigm when trying cases, which hints at a judiciary managing to remain uninfluenced by the president's war. It was also found that the judiciary appears to systematically favour the prosecution when fragile criminal investigations are amended and by giving the prosecution's evidence greater validity than the defence's evidence almost by default. As a result, while the judiciary may be resisting the reproduction of heightened punitive policies, it may be reproducing entrenched practices that are part of the legal fabric.

## The judiciary's way of dealing with the context

Bearing in mind that several judges across the country were physically attacked by gangsters during President Calderón's administration, and that the chief justice of the Supreme Court publicly announced a series of measures to guarantee judges' safety from 'organised crime', it is both meaningful and unavoidable to explore how the context informs judicial decision-making. Being immersed in a context where the military substituted for an officially annulled police force and provided a sense of order, safety and control in a hostile context, together with sudden increases in violent offending and a society demanding greater security, raises the question of what part, if any, judges play in such a landscape,

### *Case files*

THE FIRST thing to note is that the challenging context, where violence increased steeply and social dynamics were severely changed, was not reflected in the examined judgements from the HM state. Judges from both locations appeared to decide cases in a very similar manner; the judgements analysed could have been drafted by any of the judges. Neither did context emerge as an important factor in explaining the way in which offenders were treated or punished. One defendant, who participated in a gunfight with the military and attempted to flee with other suspects across a rooftop, was treated like any other defendant, received the minimum sentence and was not even considered dangerous by the judge.

The exception to the general rule was observed in a few judgements from the HM states. In these cases, judges made reference to the illicit drugs market along with other arguments aimed at demonstrating intent to supply. Only a handful of judges made those references, but such references did not seem to be decisive in the outcome; rather, they were used as an additional argument to explain the verdict.

Some degree of uniformity was expected based on that the two sets of interviewees belong to the federal judiciary, being part of the same institution, bound by the same organisational rules and incentives. The only obvious difference between them was geographical. The social context linked to each place was expected to provoke differences among judges that would be visible in judicial decision-making. The homogeneity found in judgements from both locations showed that judges are able to successfully insulate themselves from their surroundings when necessary and are similarly inclined to convict.

Are judges instructed to remain indifferent to their surroundings? Is uniform judicial decision-making a strategy to achieve the judiciary's insulation from their environment? This uniformity and resilience may be explained by a number of factors. **FIRST**, binding rulings were constantly quoted and referred to in judgments, which instruct judges in the way proceedings must be managed, how evidence should be weighed, and how verdicts ought to be reached and sentences calculated. The legal reasoning embedded in these rulings is reproduced in judgements in numerous ways in both locations.

**SECOND**, federal judges share a common judicial culture, where consistency, legal certainty and continuity are valued over creativity in a career judicial system such as Mexico's. As one judge remarked, "judges are cut with the same scissors".<sup>500</sup> The disciplined adherence to precedent may be read as a tool used by trial and appellate courts to expressly reinforce consistency in decision-making while showing deference to higher courts' interpretation of norms. Third, a formalistic and legalistic approach to judicial behaviour, where the environment or any other factors outside a case are not expected to be taken into account, may be enhanced through uniform judicial decision-making, templates and strict observance to rulings.

### *Interviews*

Judges' views on the context touched upon several topics. Concerning the military, various types of responses were found concerning the military's unlawful and abusive practices. The military was held by some to act adequately in general terms; only in a few exceptional cases had soldiers been responsible for

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<sup>500</sup> HM magistrate 4.



arbitrary actions. Others held the opposite view and described specific unlawful military practices, such as framing suspects and detaining people extrajudicially; these views coincide with what Human Rights Watch, Amnesty International and other NGOs have reported. Others preferred not to address this topic, saying they could not perceive any sort of pattern of military behaviour.

In regard to the context, several judges maintained they were insulated from the context, asserting that they ignored all external aspects of a case and were dedicated to ruling cases based on their merits and upholding due process values. Other interviewees said that such isolation from the environment is impossible and saw their judicial role as striking the correct balance between the rights of society and those of defendants. Others described how judges react in conflictive contexts. At one extreme, judges were said to heighten judicial oversight of law-enforcement agents and be attentive to human rights violations, while other judges described how colleagues were repressing criminality and taking on crime control duties. Judges also described ways in which they adapted their legal reasoning to the particular environment because it seemed a good policy or because it helped protect themselves from retaliation from dangerous offenders.

Reactions to the environment, including different ways to adapt to it, did not necessarily mean that judges have become more repressive, or that they adopted an enemy penology approach. On the contrary, it was found that their responses varied. Some treated defendants more harshly while others treated them more leniently. Also, personal safety appeared to motivate a change in decision-making, but so did consideration of better legal policy.

## Making sense of inconsistencies

### *Managing dissonance*

Enforcing the principle of presumption of innocence became a requirement once the SCJN issued a binding ruling on it that was incorporated into the Constitution. Official discourse began to embrace due process principles, including the presumption of innocence, but implementation appears to have lagged behind.

Throughout the fieldwork and data analysis it was striking to find serious divergence between opinions expressed by judges concerning the presumption of innocence and judgements. Many interviewees claimed that defendants were indeed presumed innocent, and also held that the prosecution's performance was negligent and poor. Nonetheless, judgements consistently showed that judges favoured the prosecution's case, despite it often being based solely on indirect evidence. Judges also relied heavily on rulings that instruct them to



grant more weight to prosecution evidence, i.e., police statements and circumstantial evidence.

How can this inconsistency between judges' accounts and judgements be reconciled? According to Festinger, the ways to reduce the inconsistency between public claims (embedded in judgements) and internal beliefs (described in accounts, views and opinions), are to modify the public statement or adapt an internal belief (1962, p. 96). Judgements are essentially public statements that contain the reasons and arguments that led a judge to find a defendant guilty or innocent. Once this public statement is issued and not challenged it becomes *res judicata*, in other words, contains firm legal truth and consequently becomes impossible to change. Judgements are public statements consulted by the parties involved and examined by higher courts, as well as by third parties such as myself.

To reconcile the prosecution's poor performance and a high conviction rate with the assertion that all defendants were presumed innocent until found guilty requires judges to adjust their internal opinions or beliefs, bearing in mind the difficulty of changing a judgement. One way to reconcile these could be to openly say, as some interviewees did, that the presumption of innocence is contradictory: it exists in theory, but in practice it is not enforced. Another strategy would be to declare that defendants are still presumed guilty by backward-thinking judges, but this is not the case with forward-thinking judges. Yet another way is to shift attention to changes in the criminal justice system which will (magically) make presumption of innocence workable.

Several of these strategies may be used by judges. However, there remains a gap between the constitutional principle and judgements in practice. The difficulty of shifting from a quasi-inquisitorial system to an adversarial one is reflected in the reluctance to hold the prosecutor to higher standards of evidence which will signify to release possibly guilty defendants. In the view of some, this shift will contribute to impunity. The difficulty of accepting adversarial principles is heightened by the continuing militarisation of criminal justice institutions, where crime investigation and public safety tasks are carried out with heavy equipment and military tactics and shaped by military values that regard suspects as enemies. If the principle of presumption of innocence is to be properly set in place, as part of the larger reform of the criminal justice system, this dissonance must be addressed. Otherwise, the general practice of presuming defendants guilty will be reproduced even if this principle, together with other due process values, is officially promulgated.

### *Doctrinal myths*

Fox maintains that legal mechanisms, called doctrinal myths, are created to help manage contradictions within a legal system (2005, p. 294). Accordingly, doctrinal myths enable law, legal actors and society to accept principles, such as equality, even while these are reformulated or manipulated so that contrary results, such as unequal treatment, are achieved (2005, p. 295). Doctrinal myths may help manage the contradiction of allegedly upholding the presumption of innocence while convicting almost all defendants. Binding rulings issued by the SCJN and constitutional tribunals instruct trial and appellate judges to hear cases in specific ways. These rulings, if followed strictly, lead down a path towards discarding defence evidence, upholding prosecution evidence and issuing robust convictions.

For instance, the initial declaration of the defendant rendered in court is thought of as the defendant's chance to present his case, free of any coercion or intimidation, in front of the judge who will determine his innocence or guilt (Cortés Pérez, 1990, p. 572). At the same time, the evidence principle of *inmediatez* (frequently referred to in this study) holds that the evidence produced closer to the criminal event takes precedence over evidence produced later, because the closer to the event the evidence was produced, the less chance there is of it being distorted. This means that evidence produced by the police officers who arrested the suspect and the defendant's declaration at the prosecution office are given greater evidentiary weight than the defendant's initial declaration given in court, even if the prosecution's evidence lacks any revision or guarantee of legality. As a result, the statement the defendant gives in court, which is allegedly rendered free of coercion, has less evidentiary value than police statements or the defendant's own statement given at the prosecution agency.

Another example concerns the principle of equality of arms. The judiciary has issued many rulings concerning the importance of offering both parties the same opportunities to prove their case.<sup>501</sup> Nonetheless, police evidence will always be closer in time to the criminal event, which means the defence's evidence will inevitably have less evidentiary significance and, in consequence, the goal of providing equality of arms in trial is not met even before proceedings begin.

Furthermore, I observed throughout the judgement analysis that rulings quoted in judgements deem the police to be independent and impartial witnesses. At the same time, police forces across Mexico suffer from corruption, negligence and selective investigation, to the extent that in some places the po-

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<sup>501</sup> Ruling entitled: "Protection to people in trial proceedings should be granted in conditions that do not affect procedural equality or the defendant's right to due defence".

lice force was dissolved because of these and other problems (López Portillo Vargas, 2002). A clear inconsistency exists concerning police credibility. The rulings that highlight police officers' good faith and independence act as doctrinal myths that help manage the dissonance between portraying officers as independent witnesses in trial while knowing that the police are steeped in corrupt and unlawful practices.

The rulings concerning evidence principles and burden of proof, together with judicial practice on supplementing evidence, help to resolve the dissonance between prosecutors' negligent and inept performance and judges reaching guilty verdicts. Hence many binding rulings embed doctrinal myths that uphold due process principles while providing judges with legal reasoning to reach guilty verdicts.

### *Denial in operation*

In the mid-1990s, the scjn approved military participation in crime control activities and would authorise property searches without a court order whenever a flagrant offence occurred. Human rights complaints against all law enforcement agents, including members of the military, peaked once soldiers were authorised to conduct property searches and participate in public safety tasks.

The judicial practice of considering military abuses to be exceptional needs further discussion in light of reports issued by several human rights organisations. To claim that the military rarely commit abuses or that there is a widespread misconception about the military's activities is to directly contradict the evidence submitted by the CNDH, Human Rights Watch, Amnesty International and other NGOs, which have documented complaints involving torture and other abuses committed by the military and other security forces.

The CNDH reported abusive behaviour to be a common practice among law enforcement officials. From 2006 to 2011, police and soldiers often carried out property searches without proof of illegal activity (2011, p. 2-3). The CNDH also found that police and military officials "build" cases of flagrant offences to justify the searches by planting illegal objects, such as drugs or weapons, in the searched premises (p. 20). Human Rights Watch concluded in 2011 that all security forces involved in counter-narcotics operations, including the military and federal, state and municipal police forces, were guilty of torture linked to crime investigation (p. 7). Although torture of civilians by security forces has been frequently reported, these practices increased after the federal government adopted a more aggressive counter-narcotics strategy (2011, p. 7). Amnesty International also confirmed that civilian complaints against the military increased after soldiers were deployed to perform public security

functions (2015). The growth in complaints was so widely reported that in 2013 the Military Code of Justice was reformed to enable investigations into human rights violations, investigations that were previously impeded by military jurisdiction.

Whether judges hold security forces accountable for torture and other serious violations is questionable. On the one hand, most torture cases, like many other crimes, go unreported. According to Human Rights Watch, torture victims are prevented from reporting their mistreatment due to fear and distrust of the authorities. The lack of reporting prevents security forces being held accountable, paving the way for further torture and illegal operations (2011, p.7). On the other hand, it was found throughout the analyses of judgements that first instance judges tended to disregard allegations of mistreatment, including torture and extended detentions committed by both military and police agents.

Judges' opinions that these cases of mistreatment were exceptional may illustrate an attempt to deny or minimise the harm done by the military because of the benefits of deploying soldiers or general empathy towards them. Using the phrase "bad manners" to refer to mistreatment practices resonates with what Cohen identified as different denial strategies (2012). By labelling cruel and illegal practices differently, their legal and common sense meanings are nullified (Cohen, 2012, p. 106-107). A euphemism such as "bad manners" becomes a palliative way to speak about unlawful practices, such as torture or illegal property searches, minimising their inherent cruelty and harm. An effort to deny or at least minimise the military's unlawful behaviour may be a way to show deference to the military who are allegedly waging a war to protect society despite the fact that their manners are improper. There may have been a genuine sentiment of solidarity with those involved in restoring safety and order, particularly in the HM state. After all, while patrolling the state, the army often faced gunfire from equally well-equipped opponents.

Third, interviewees' trust in the military draws on the fact that polls have consistently shown that the Mexican army has greater public credibility than other institutions, including the SCJN and the police (Consulta Mitofsky, 2009; INEGI, 2015). Camp concluded that the Mexican military is unique in that it performs a wide variety of duties, including humanitarian tasks such as delivering vaccines to marginalised communities and providing aid in natural disasters (1992). As a result, it could also be that judges genuinely give soldiers greater credibility than other law enforcement agents and thus consider them less prone to act unlawfully. Moreover, judges appeared to be very aware of their own lack of credibility in society which, added to the public's vote of confidence in the army, may add greater pressure to validate the army's wrongdoing.

## Contributions to knowledge

Examining enemy penology in current judicial decision-making and behaviour contributed to the understanding of the federal judiciary. The primary contribution was to establish that the federal judiciary did not appear to reproduce the president's policy of declaring war on defendants deemed as enemies, facilitating convictions by reducing defendants' procedural rights and sentencing with the purpose of eliminating them. This finding is based on in-depth analysis and comparison of drug-related judgements and interviews with judges from two (out of 31 and the federal district) states with strikingly divergent contexts.

Drawing on enemy penology to establish the judiciary's response to the current political and social context in Mexico provided insight about the judiciary during a severe safety crisis. The judiciary can be seen as a kaleidoscope whose pieces are all different, but by shedding light on specific themes, clearer shapes come into focus. One theme that unfolded from testing enemy penology was the judiciary's insulation from the environment and independence from external pressures, including the executive branch of power. It is argued throughout the thesis that this independence stems from a formalistic and legalistic approach. This approach understands judicial behaviour as unattached from any external aspects but rather is focused on deciding cases based on the accurate interpretation of the law and precedent. This approach to judicial behaviour is fostered by the judiciary through different strategies, one of them being to enhance the use of templates and reference to both binding and non-binding rulings, which results in homogenous judgements, shielding judicial decision-making from alternate legal arguments or interpretations. Another strategy concerns the close oversight exercised by upper courts on lower ones through reversals which shape the content and direction of lower court judgements, discourage creative decision-making and safeguard legal certainty and consistency.

Another theme is that judges currently find themselves in a shifting legal landscape. They are required to enforce new rules and principles in the face of a radically different criminal justice system and the constitutional command to interpret the law in line with human rights treaties. As a result, judges appeared to be adapting to a structural change in their roles in front of peers and other criminal justice practitioners. In this context, a variety of roles embedded in judges' opinion were traced. Some seemed to agree with the law-interpreter and ritualist roles, where judicial duties are confined to deciding a case based solely on the casefile and applying the law and precedents accurately, disregarding any external pressures or factors. Other judges' accounts seemed to be compatible with the pragmatist role, where a sense of fairness seemed more important than

an accurate interpretation of the law. Also, adjudicator and mediator roles were traced, in which judges were said to be playing a key part in restoring order in society and reaching a balance between society's demand for greater safety and defendants' due process rights. Conversely, other judges' views seemed more akin to a law-maker or policy-maker role, which understands judicial duties to encompass influencing policy through their decisions.

Additionally, several judicial practices revealed by the research, together with rulings and principles that enhance an inquisitorial role, provide deeper understanding of what may hinder the progress of criminal justice system reforms. Increases in crime together with blatant impunity may explain some judges' reluctance to enforce the presumption of innocence. At the same time, these concerns may persuade judges to not hold prosecutors to adequate evidence standards and eventually opt to convict. It is crucial to bear in mind that mechanisms such as cognitive dissonance or doctrinal myths may be used to manage inconsistencies between the new rules, including the presumption of innocence, and traditional practices. More importantly, these mechanisms may help maintain traditional practices while claiming that new rules are being enforced. If some members of the judiciary resist changes in the law, they may resort to doctrinal myths to cover and manage their resistance to accepting the new rules. Also, cognitive dissonance may come into play if judges claim to embrace new principles while maintaining practices that echo inquisitorial attitudes.

These different topics provide rich insights that could help implement successful reforms to the criminal justice system. The effectiveness of binding and non-binding rulings in fostering uniformity also demonstrates how these rulings reproduce a particular way of interpreting the law. In other words, rulings appeared to be effective vehicles for introducing or maintaining legal principles and values, including due process ones. However, doctrinal myths highlighted many contradictions. These contradictions need to be addressed if the judiciary is to pursue a genuine transformation of judicial decision-making to the point where defendants are routinely presumed innocent.

Finally, judges cannot be thought of as emotionless, detached from the cases they hear and the surroundings in which they are immersed. Stepping into their shoes throughout the research raised different types of concerns, such as feeling that legislation limits their ability to reach fairer verdicts; that by imposing lower sentences their safety is ensured; or that the army may defy judicial decisions. This is not to suggest that judges should not aim at being impartial or objective, but it seems fruitless to overlook these matters while fighting for change.

## Implications for policy, law and practice

### *Power of rulings*

It was found that rulings contain influential guidance for low-tier courts. Many of these rulings are intended to shift the scales in favour of the prosecution, giving greater evidentiary weight to evidence produced during the pre-trial phase rather than in front of the judge; privileging police-produced evidence; or authorising the use of circumstantial evidence.

The new criminal procedure legislation already states that evidence produced during the pre-trial stage, including witness statements, needs to be produced again during an oral hearing in front of the judge to make it admissible. Requiring judges to assess evidence produced in court will affect the way proceedings are managed and the outcome of cases. New evidence rules such as this aim at fairer—or at least safer—judgements. However, guidance and approval from rulings is necessary to successfully applying new rules. I consider it essential that certain rulings should be officially substituted or eliminated, such as those that concern evidence principles. Otherwise, as Posner points out, a contradictory range of precedents allows judges to pick and choose whatever ruling fits their own decision (2008).

Binding and non-binding rulings are internal policies within the judiciary that can be harnessed to enhance successful reforms. In addition to these rulings, other internal influences can foster change within the judiciary. These include administrative incentives that make acquittals an unpopular choice. This is wrong. A judge should feel supported and well-regarded by his peers and superiors regardless of whether he acquits or convicts.

External obstacles concern other parties that are difficult to control, such as the media. . However, if internal influences are addressed, the impact of external ones would consequently diminish. For example, if judges could rely on internal support when they found a defendant innocent, the media would be less brazen in suggesting the judge colluded with or was corrupted by the defendant.

### *Sentencing*

Concerning sentencing, the legal and policy implications are clear. Rules leave judges little room for manoeuvre when deciding between custodial and non-custodial punishment. Also, minimum sentencing appears to be imposed by default. If sentencing should be meaningful and fair, judges need wider discretion. However, sentencing reform needs to be sustained by rulings that instruct judges to sentencing guilty defendants based on the merits of the case, instead of imposing minimum sentences as a strategy to relieve workloads and avoid



reversals. Overall, sentencing practices cry out for reform in order to make judicial discretion count. If sentencing tariffs included types of punishment other than custodial, this could foster better use of judicial decision making.

### *Operating in challenging environments and honouring impartiality*

Judges attempt to insulate themselves from the external environment, including circumstances where armed violence has become extremely prevalent, policing has become highly militarised and the military are involved in law enforcement. Such an environment can be dealt with by ignoring it or by adapting decision-making to the environment. More and more areas of Mexico can be considered challenging environments, because the security crisis has no foreseeable end and nor does the military's involvement in crime control affairs. At the same time, each of these environments has distinctive social, political and geographical characteristics, together with a changing criminological landscape. To disregard or minimise the effect of this on the judiciary and on judicial performance is to turn a blind eye to a crucial matter which currently appears to be dealt with informally or not at all. Therefore, judicial institutional policies should provide judges with devices to adapt to the context in order to keep them safe.

By contrast, if judicial institutional policies are thought of as unnecessary, because judges are supposed to be impartial and objective whatever their surroundings, any attempts to reform judicial decision-making or judicial behaviour are doomed to fail, because this project has demonstrated that judges are not individuals living in a bubble, free of worries and interests.

## **Limitations**

This research has several shortcomings. Some of these concern methodology, others the changing legal landscape.

### *Methodology*

The sample of judgements is small in comparison with all cases available, which limits the generalisability of the findings. A total of 40 judgements were analysed in detail from both the LM and the HM states, but the sample was far from representative. For instance, in the LM state in 2010, 852 criminal cases were opened. From these cases, 12 were randomly selected and requested, of which only three concerned drug offences. Similarly, in that same year 1,190 cases were initiated in the HM state, of which 16 were solicited and, following the same rationale, only three analysed.



The sample thus became more limited as it grew more specific. It is noteworthy that there are no systematic statistics within the judiciary on the total number of cases per type of offence. Judgements that met the criteria could only be found by soliciting a large number of cases, of which only a small minority dealt with drug offences.

As a counter-argument, the selection was genuinely random, which augments its validity. Also, the judgements I examined were issued by all courts in the HM state and more than two-thirds of courts in the LM state. It was thus a heterogeneous sample of judgements, which strengthens the claims made here. Even though the sample was not expected to be representative, the analysis sought to be thorough and enunciate the methodology used as clearly and transparently as possible to explain the evidence that sustains the claims made here.

I examined only two states out of a total of 31 states and the federal district. The HM and LM states I examined are located in very different parts of the country and offered very different socioeconomic and criminological contexts. The selection of states sought to compare two diverse landscapes at a single point in time. The two states are sufficiently different to provide interesting insights into judicial behaviour and judicial decision-making, but they do not attempt to represent the diversity of the country. There are many different Mexicos within the country. The generalisability of this work was envisioned as limited. Nonetheless the number of interviews conducted in each site may be considered to be representative, bearing in mind the total number of judges and magistrates in each place. For instance, I interviewed 14 out of 19 judges and magistrates located in the LM state, and eight out of 14 in the HM state.

### *Changes in the normative landscape*

As mentioned earlier, the Mexican criminal justice normative landscape is changing. The National Criminal Procedure Code was issued in 2014 and will come into force gradually. It contains a completely new set of rules for the way proceedings should be managed, embedding adversarial values. This new system has been experienced by some Mexican judges but will take many years to become part of national practice. This work examined the rules of the former criminal procedure legislation that applied when the project was designed and when the data was collected and analysed. Hence, it could be argued that this project will soon be outdated, which might call into question the currency and validity of the claims made here.

However, I believe that the findings of this thesis shed light on different threads that weave into the complex role and image of the Mexican federal judge, threads that will probably remain despite the changes being made to

the law. The observations made here concerning, for instance, the ways in which judges perceive and conceive defendants, presumption of innocence, prosecution and sentencing, transcend rules and trends. On the contrary, these observations help explain judicial bearings which touch upon precedent adherence and attitudinal and managerial approaches, all of which inform judicial decision-making.

## Final thoughts

### *Bravery of the courts*

During this project I had a glimpse of the inner world of the federal judiciary, fulfilling the methodological aim of stepping into these judges' shoes. I left the fieldwork, and their shoes, with a few thoughts. I instinctively felt that some judges see themselves as secondary and passive authorities. Judges who must decide a case while hemmed in by rules and binding rulings appeared to have little margin of discretion, which, as Taruffo argues, limits their own responsibility in the case (2003). Judges did not seem to be empowered to limit abuses by other criminal justice officials such as police officers, military personnel and prosecutors. However, during fieldwork I learned about the bravery shown by many judges. Judges and other court officials, including prosecutors and defence attorneys, are required to try all defendants. Many defendants are from vulnerable backgrounds and pose minimum risk to society, but others are involved in violent, dangerous criminal gangs. Courts must offer fair and equal treatment. This is everyone's demand, including mine. However, one must consider the fact that judges' own physical safety may be at stake. Good judgement may, literally, be a matter of life and death.

I met many judges, several of them women, who told me about having to decide cases in which all female personnel, except the judge herself, were sent home as a way of protecting them from dangerous defendants, and only male officials worked the case. For instance, one judge received in her chambers a large group of men with guns, wearing sombreros in a defiant way, who simply came to show their gratitude after she decided in their favour. She said it was not a matter of her freedom to decide the case but simply that the law permitted her to grant parole to their friend. Nonetheless, that didn't keep them from thanking her and at the same time intimidating her in her own office. She described how her knees were shaking on the other side of the desk—but happily all the men could see was the thin piece of wood that stood in between.

In addition to bravery, I found an express interest in fairness throughout the fieldwork. Some judges appeared to look beyond the written case file to

find an equitable solution for the people involved. Solutions ranged from ensuring proper compensation for victims of human trafficking to reducing the seriousness of the charges pressed against a single mother who confessed to selling drugs to support her five children, including one born during proceedings. Some judges appeared to be genuinely interested in defendants and victims and concerned about reaching fair decisions.

### *Judges' audiences matter*

Together with considerations of good legal policy, Baum maintains that external motivations may provide a better understanding of judicial behaviour (2006). According to Baum, if judges are portrayed as lacking emotion and ignoring self-interest, then insight into what shapes judicial behaviour is incomplete (Baum, 2006, p. 174). Judges, like any other actors, seek respect from the social groups that are salient to them. This may involve members of their guild or external groups such as the mass media. Judges' peers and superiors were found to be relevant to judges; interviewees mentioned that when drafting decisions they bore in mind the chance of reversal or the need to persuade upper court judges. This is significant not only because reversals are seen as bad judicial performance, but also because acceptance within the judiciary matters to judges.

At the same time, many judges commented on the mass media, specifically being pressured to decide cases the way the media wished. Judges proved to be both aware of and concerned by social distrust of the judiciary. It is difficult to prove the extent to which these concerns shape judicial performance. However, it is possible that these concerns exert pressure on trial judges to convict, especially bearing in mind that acquittals are notoriously unpopular within the judiciary as well as in society, an attitude encouraged by the media. Ultimately, taking notice of these concerns may provide a better understanding of the judiciary as a whole.

### *Judicial independence and impartiality*

As in other Latin American jurisdictions, judicial independence from other branches of government is relatively novel in Mexico. Strategies to safeguard this independence range from giving more powers to the scjn and raising salaries to establishing a career system that determined judges' appointment and removal guidelines. Throughout this research it was found that judges profess themselves to be impartial, independent from any source of pressure. Nonetheless, it has been acknowledged by the Chief Justice of the scjn and the Special Rapporteur on judicial independence that judges demand further safety

measures to guarantee not only their personal safety but also independent and impartial decision-making. Throughout the research, a few indications were found that suggest judges draw on different strategies to preserve their own safety in challenging environments. These include sentencing dangerous offenders with leniency and issuing judgements that neglect contextual features in cases that involve members of violent criminal groups.

At the same time, I found indications that judges are constantly harassed by state agents. This research corroborated Pásara's claims (2006) that the prosecution relies on diverse strategies to win a case, including filing criminal lawsuits against judges. Indications of intimidation strategies used by the military and by the president were also found. All these different forms of pressure put independence and impartiality to the test.

Whether these forms of pressure continued after Calderón's administration ended is beyond the scope of this research; the question calls for further inquiry. Two interesting notes are worth mentioning. The judicial and legislative branches of government have reformed the Military Code of Justice in order to curtail military jurisdiction and authorise judicial oversight over military misconduct. The scjn's decisions in tandem with national reforms signpost the need to limit the military's scope of action and hold it accountable, particularly in light of the militarisation of criminal justice, which appears, as many scholars anticipated, to be entrenched and difficult to reverse. The second note relates to the most recent justice appointment. In March 2015, Eduardo Medina Mora, a former Attorney General (2006 to 2009) and also former Head of the Public Safety Secretariat (2000 to 2005) became a member of the scjn. Prior to this appointment, many voices called for a rejection of his candidacy.<sup>502</sup> Amongst these, the National Association of Judges publicly opposed his appointment and asked the Senate to safeguard the scjn's independence and abide by the constitutional principle of division of powers, a principle that would be threatened if Medina Mora was appointed (Redacción Impacto, 2015). But this appeal went unheeded. It came as no surprise that, during the latest discussion held in the scjn on the *arraigo*, Medina Mora argued the *arraigo* does not contravene constitutional basic rights (Reyes, 2015). To this day, *arraigo* is considered constitutional by the majority of the scjn and, in consequence it is still used as an investigative tool.

This study shows that judicial independence and impartiality appear to be

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<sup>502</sup> Academics and members of NGOs collected over 52,000 signatures for a petition opposing Medina Mora's appointment in [www.change.org](http://www.change.org). The petition claimed Mora was responsible for institutional damage based on different cases of human rights violations reported under his direction, and other cases said to be strongly influenced by the president in office (Torres, 2015).

holding firm, despite continuous pressure from many different sources. During this unprecedented safety crisis, pressure is being applied by organised criminal groups on one hand and state officials on the other. Both sides seek to influence judicial decision-making. Securing an independent and impartial judiciary is a work in progress. It is important to acknowledge the different issues and actors that may affect this process. My hope is that this study will provide an insight into the world of the Mexican judiciary at this important historical moment and will point the way for future research into judicial decision-making and independence under fire.



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## Legislation

Mexican Constitution  
 Federal Criminal Code  
 Federal Criminal Procedural Code  
 Federal Legislation on Organised Crime  
 Public Health Law  
 Law of the National Public Safety System  
 Law of National Security  
 Ley de Amparo  
 Military Code of Justice  
 Organic Law of the Federal Judiciary  
 Organic Law of the Attorney General Office  
 Law of Personal Data Protection

## APPENDIX 1

# Ethics form, Information Sheet and Interview Schedules

## Research Ethics – Risk Checklist

- Complete the checklist ticking yes to any of the sections relevant to your study.

Name:	Ana Cárdenas
Review Committee:	Law Panel (Law REP)
Title of Study:	Mexican criminal policy and its effects on the judiciary

		Yes	No
A	<p>Does the study involve participants who are particularly vulnerable or unable to give informed consent or in a dependent position (e.g. vulnerable children, your own students, over-researched groups, people with learning difficulties, people with mental health problems, young offenders, people in care facilities, including prisons)?</p> <p>If you have ticked yes to this section, will financial incentives (other than expenses) be offered to participants? YES NO</p> <p>If yes, please state how much.</p>		
B	Will participants be asked to take part in the study without their consent or knowledge at the time or will deception of any sort be involved (e.g. covert observation of people in non-public places)?		
C	Is there a risk that the highly sensitive nature of the research topic might lead to disclosures from the participant concerning their own involvement in illegal activities or other activities that represent a threat to themselves or others (e.g. sexual activity, drug use, or professional misconduct)?		
D	Could the study induce psychological stress or anxiety, or produce humiliation or cause harm or negative consequences beyond the risks encountered in normal life?		
E	Does the study involve imaging techniques such as MRI scans, x-rays or ultrasound?		
F	<p>Does the study involve physically intrusive procedures?</p> <p>If yes, continue below and ensure you have also completed the Section B form:</p>		

i	Does the study involve only moderately intrusive procedures (taking less than 40ml blood, collecting bodily waste, cheek swabs)?		
ii	Are substances to be administered (such as food substances) which are <u>not</u> classified as 'medicinal products' by the MHRA? (see Section B guidelines for more details)		
iii	Are substances which are classified as 'medicinal products' by the MHRA to be administered? (see Section B guidelines for more details)		
iv	Does the study involve DNA or RNA analysis of any kind? (see Appendix D)?		
v	Are invasive, intrusive or potentially harmful procedures not already covered by items i, ii, iii & iv to be used in this study?		

APPLICATION FOR ETHICAL APPROVAL

Please tick the Subcommittee or Panel you are applying to:

Research Ethics Subcommittees (RESCs)

<u>PNM RESC</u>	<u>SSHL RESC</u>
<u>(Psychiatry, Nursing &amp; Midwifery</u>	<u>(Social Sciences, Humanities</u>
<u>&amp; Law)</u>	<u>(High Risk)</u>

BDM RESC (Health)  
(Biomedical Sciences, Dentistry, Medicine  
and Natural & Mathematical Sciences)

Research Ethics Panels (REPs)  
For SSPP, Humanities and Law (non-high risk only)

<u>E&amp;M REP</u>	<u>GGs REP</u>
<u>(Education &amp; Management)</u>	<u>(Geography, Gerontology,</u>
<u>SCWRU)</u>	

<u>Humanities REP</u>	<u>War Studies Group REP</u>	<u>Law REP</u>
	<u>(Law &amp; Department of Political Econ-</u>	
	<u>omy)</u>	

Notes for all applicants

- Please read the guidelines before filling out the application form and refer to the specific guidelines about each section when filling in the form. (<http://www.kcl.ac.uk/research/ethics/applicants/>)
- Refer to the Guidelines for the submission deadlines for your Subcommittee and the number of copies to submit (including electronic versions if applicable).
- All applications should be submitted by 5pm on the deadline day.



- All Subcommittee applications should be submitted to the Research Ethics Office, 5.11 Franklin Wilkins Building, (Waterloo Bridge Wing), Waterloo Campus, King's College London, Stamford Street, London SE1 9NH.
- All Research Ethics Panel applications should be submitted to SSPP Ethics Administrator, Ko.58 Ground Floor Strand Building, King's College London, The Strand, London WC2R 2LS.

#### SECTION A – TO BE COMPLETED BY ALL APPLICANTS

1. APPLICANT DETAILS	
1.1 RESEARCHER	
<p>Researcher's Name: Ana Cárdenas</p> <p>Researcher's Department &amp; School: Law</p> <p>Status:</p> <p>Undergraduate   Taught Postgraduate   MPhil / PhD/ Specialist Doctorate</p> <p>Staff Research</p> <p><u>If Student:</u></p> <p>Name of course/qualification: MPhil/PhD in Law</p> <p><u>If Staff:</u></p> <p>Researcher's Post:</p>	
1.2 CONTACT DETAILS	
<p>Email: (Please use your KCL email address where possible)</p> <p>ana.cardenas_gonzalez_de_cosio@kcl.ac.uk</p> <p>Telephone number: 07400926007</p> <p>Address: 12a Leamington Road Villas, London, W11 1HS</p>	
1.3 SUPERVISOR - COMPLETE FOR ALL STUDENT PROJECTS (Including PhD)	
<p>Name of Supervisor: Benjamin Bowling</p> <p>Supervisor's Post: Professor of Criminology and Criminal Justice</p> <p>Supervisor's Department (if different to student):</p> <p>Supervisor's email address: ben.bowling@kcl.ac.uk</p>	
1.4 OTHER INVESTIGATORS, COLLABORATORS, ORGANISATIONS	
N/A	
2. PROJECT DETAILS	
2.1 Project Title	Mexican criminal policy and its effects on the judiciary

2.2 Projected Start Date of Project This should be when you intend to start work with participants.	2012-September-15 (I already booked a round trip from London to Mexico City)
2.3 Expected Completion Date of Project Please note: Ethical approval must cover from the start of the research study up until data are archived or destroyed.	2015-September-15
2.4 Sponsoring Organisation Your sponsor will be assumed to be King's College London unless stated otherwise. NB: Do not put 'N/A'.	King's College London
2.5 Funder (e.g. self-funded, King's College London, ESRC, AHRB, EU)	Mexican government agency named CONACYT (National Council for Science and Technology)
2.6 DOES THE STUDY INVOLVE HUMAN PARTICIPANTS OR FOR OTHER REASONS REQUIRE ETHICAL APPROVAL?	
<p>NB: It may be the case that research does not involve human participants yet raises other ethical issues</p> <p>with potential social or environmental implications. In this case you should still apply. Please consult with the Research Ethics Office (rec@kcl.ac.uk) if in doubt.</p> <p>Yes                      No</p>	
2.7 OTHER INFORMATION RELATING TO RISK	

Will the study place the researcher at any risk greater than that encountered in his/her daily life? (e.g. interviewing alone or in dangerous circumstances, or data collection outside the UK).

Yes                      No

The data will be collected from outside the UK in Mexico (where the researcher is from) but this fact is not considered to involve any risk.

If applicable:

Does the study involve the using a Medical Device outside of the CE mark approved method of use? (see guidelines) If you are using a medical device 'off label' (outside of the approved method of use) then a risk assessment needs to be completed. For further information on medical devices see the Medicines and Healthcare Products Regulatory Agency web pages: <http://www.mhra.gov.uk/Publications/Regulatoryguidance/Devices/index.htm> and <http://www.mhra.gov.uk/Publications/Regulatoryguidance/Devices/GuidanceontheECMedicalDevicesDirectives/index.htm>.

Yes                                      No

If you have ticked yes to either of the above:

Yes, and I have completed a risk assessment which has been co-signed by the Head of Department/ I have discussed the risks involved with my supervisor or Head of Department and agreed a strategy for minimising these risks.

## 2.8 OTHER PERMISSIONS, ETHICAL APPROVALS & CRIMINAL RECORDS BUREAU CLEARANCE REQUIRED

**ANOTHER REVIEWING BODY/PERMISSIONS** - Are any other approvals by another reviewing body (including other ethics committees, gatekeepers and peer review) required? If yes, give details and say when these will be obtained. In cases where ethical or legal permissions are required from local organisations or gatekeepers, it is the researchers responsibility to ensure that these have been obtained prior to commencing the study. If they have already been obtained you should provide a copy of the approval with the application otherwise you will need to supply it when ready.

YES NO

**CRIMINAL RECORDS BUREAU** – If you think Criminal Records Bureau clearance might be necessary for your project, ensure you have contacted the Criminal Records Bureau directly to confirm whether or not this is the case. You will need to ensure you have the appropriate and necessary Criminal Records Bureau clearance for your study prior to commencing recruitment or data collection. You may wish to consult with the relevant ‘gatekeeper’ organisation in which you are undertaking the study with respect to this issue.

If Criminal Records Bureau clearance is required for your study, please confirm that clearance will be sought before commencement of the project. YES NA

## 2.9 Research involving human volunteers

Please consult the following page of the King’s College London website to see if your study falls under the exclusion criteria with respect to the College’s insurance arrangements: Not excluded

(<http://kcl.ac.uk/about/structure/admin/finance/staff/insurance/trials.html>)

If your study does fall under these exclusions, confirm that prior to undertaking the study you will ensure you have gained confirmation from the Finance department that the study is covered by the College’s insurers, as per the procedure outlined on the aforementioned web page: YES NO N/A

## 3. AIMS, OBJECTIVES & NATURE OF STUDY

*Provide the academic/scientific justification of the study as well as detailing and explaining the principal research question, objectives and hypotheses to be tested.*

In the past 15 years, Mexican criminal policies and regulations have undergone deep changes which advance a pre-emptive and proactive approach towards criminality. The context of these changes involve steep rises in criminality rates, the increased participation of the military forces in public security and crime control issues, public officials’ discourses blended with warfare ideas, and strong public support for a “law and order” approach despite its compromise of civil liberties. It is claimed that the Executive and Legislative have designed and implemented policies and laws which embed a Criminal Law of the Enemy (CLE) approach which, in a nutshell, advances: a) punishment is enforced before an actual offence is committed in the face of dangerous risk; b) disproportionate sentences are imposed in the name of security and, c) certain procedural rights may be suppressed.

This research is a case study on the judiciary and its different responses on the current developments of Mexican criminal policies and socio-political context, through the management of criminal cases. Hence, the research question is: “Is the Federal judiciary embracing a CLE model? The research seeks to unpack CLE elements in the context of judicial decision making, to explore the way in which these elements are embedded in judges’ perspectives and resolutions and to identify the possible conditions that trigger the application of any or all of the these elements.

This research aims to contribute in two ways. First, the penal judiciary, as part of the criminal justice system, is a subject under-researched, as the main body of studies have focused on the police and on the prosecution services. Also, the increasing role and participation of the military in designing and implementing criminal justice policies has gained wider attention, however, its effects on criminal justice practices, including the judiciary, remain a prosperous area of research. As a result, this research hopes to increase the scarce knowledge on the penal judiciary and examine, from their point of view, any possible effects of current developments, including the increasing role of the military, in the way they decide criminal cases.

Second, although the judiciary has become an increasing subject of analysis in Mexican and Latin American research, it is greatly focused on High Courts’ decisions (Calderos, 2009; Helmke & Rios-Figueroa, 2011). As a result, lower courts’ decisions and views are left aside. Therefore, this research hopes to contribute by giving voice to the judiciary through interviews, and to capture views and opinions from a wider range of members of the judiciary.

Although a qualitative approach has been used to analyse the judiciary, the model of CLE has not been used to guide the collection and analysis of both case files and semi-structured interviews. Furthermore, it has been claimed that qualitative research on the judiciary has lacked rigour and transparency in the guiding decisions of data collection and analysis. Hence, this research aims to address both issues while using theory as a primary guidance for the collection and analysis of data.

In sum, this study seeks to increase the understanding of the impact of current criminal policies, focusing on the judiciary, while at the same time, capturing the judiciary’s own views and understandings. Its main motivation is to contribute to a better understanding of the complex social and political landscape which Mexico faces and of the policy choices made in the last 15 years.

#### 4. STUDY DESIGN/METHODOLOGY, DATA COLLECTION & ANALYSIS

*Provide a brief outline of the step-by-step procedure of your proposed study in lay language in no more than 1 page where possible.*

##### 4.1 Research Design/Methodology

The research design is a case study because this method allows examining current, as opposed to historical events, and focuses on a unit of analysis –the Federal judiciary– within its context –Mexican social and political context. In the present research, the context is paramount to the core of the study because the Federal judiciary, as part of Federal government, is affected by its policies and measures, and because judges live and work in a social context informed by mass media messages, social attitudes, and their own experience. As a result, their role and decisions may be influenced by different sets of pressures.

The case study design will use two “embedded” variant cases: the Federal judiciary located in XXX (where there is active participation of the military in conjunction with police forces), and the Federal judiciary located in XXX (where there military has not been fully deployed to), in order to compare and contrast difference in attitudes, opinions and case management of members of the judiciary, as well as other relevant actors including other criminal justice practitioners, members of NGOs and academia, in both settings.

The selection of the embedded cases follows a purposive sampling rationale because the active involvement of the military is strongly related to the theoretical model used. In addition, access possibilities and comparability of the states were also important for the case selection.

4.1.1. Access: In the capital cities of both states the author has several connections which will facilitate interviewing members of the judiciary, members of NGOs and academics. On the one hand, the researcher grew up and lived in XXX City until 2003. She has personal contacts with a Federal magistrate in XXX, in addition to some members of the Law Faculty of a local university and members of local NGOs. On the other hand, the researcher has personal contacts in XXX (capital city of XXX) and professional ones with an important national NGO directly involved with the on-going judicial reform.

In addition to the selected cases, other possible interviewees, including members of the Federal judiciary, located in Mexico City will also be approached in order to gather richer insight. Overall, the researcher has a strong set of social and professional networks in the three cities (XXX, XXX and XXX City) which may facilitate accessing and pursuing this research.

4.1.2. Comparability: XXX and XXX are two different states which, despite important socio-economic differences, do not have too distinct variations in regard to Federal offending rates. For this reason, and given the wide differences of offending rates within the country, these states are thought to be comparable.

#### 4.2 Data Collection

The research is mainly based on two sources: semi-structured interviews and public decisions of criminal cases.

##### 4.2.1 Semi-structured interviews

Semi-structured interviews will be used because they allow collecting rich and detailed data. Also, they are preferred when people’s knowledge, understandings and views are meaningful to the research, such as the present one.

The main interviewees are Federal judges and other criminal justice officials. The Federal judiciary in XXX is comprised of 19 judges, 23 public defenders (approximately) and several members of the prosecutions services. In contrast, there are 14 federal judges in XXX, approximately 26 public defenders and several members of the prosecution services. The approximate number of interviews conducted should not be below 20 in each site in order to have an in-depth understanding of their views and opinions.

Members of the judiciary in Mexico are frequently involved in academic activities, particularly giving lectures or regular classes in universities. Also, judges are likely to be invited to participate in conferences and seminars. In this context, the judiciary is not bound to gain permission from an administrative body (i.e. the Federal Judiciary Council) to give a lecture or participate in an interview and tend to be responsive to academic interests.

In addition to members of the judiciary, former criminal justice officials, members of NGOs, academics, journalists and anyone which has knowledge on the current socio-political context can participate in order to gather diverse information and a deeper understanding of both the context and the judiciary.

Access may be facilitated by the personal networks of the researcher described above together with a snowball strategy which involves building the sample through referrals.

Accessing criminal justice officials involves inherent limitations due to the natural secrecy of dealing with criminal issues and the general reluctance of the judiciary to share their views on political issues. Nevertheless, this pitfall may be overcome with the fact that this research will be presented as an opportunity to acknowledge the judiciary's views and as a chance to communicate their voices. Also, the research does not seek to examine particular decisions or cases but gather overall views, because they are not the subject matter of this research but also to avoid any possible risk.

The interviews will focus on exploring the presence or even predominance of CLE elements through: the ways in which the interviewee addresses society's safety as a main motivation in punishing an offender; the main purposes of punishment and the harshness or leniency in which offenders are being punished; the different motivations and thresholds for issuing pre-emptive measures, and the ways in which the offender is understood and referred to.

In addition, broader questions concerning the general context will be raised, touching upon issues including: a State's pre-emptive and proactive responses to offending; the increasing participation of the military in crime control policies; the role which the judiciary should play within the criminal justice system and within the broader context, and whether their way in managing cases is thought to have changed in the past 15 years and if so, what could the main causes be.

#### 4.2.2. Archival material: case files

The analysed cases will range from 2000 to 2010 by Federal courts in Mexico City, XXX and XXX, concerning the two most frequent Federal offences consisting of drug-related and firearms related offences. Also, decisions about pre-emptive measures (detention orders and property search orders) will be analysed. Case files are considered public documents, accessible to anyone, under the Mexican Transparency Act, therefore do not involve any sensitive information.

Similarly, analysis of archival material will concentrate on the relevance of safety as a motivation for the infliction of punishment; the main purposes of punishment; the different motivations and thresholds for issuing pre-emptive measures, and the ways in which the offender is understood and referred to.

The information gathered will be in Spanish and the researcher will be in charge of its translation to English.

#### 4.3 Data analysis

The main threads of the interviews and archival analysis draw on the Criminal Law of the Enemy (CLE) model explained above. This theoretical framework will guide data analysis in order to ascertain whether the judiciary has inclined towards a CLE approach in deciding cases. This analysis strategy refers to what Yin calls the strategy of relying on theoretical propositions because the elements of CLE are informing both the way in which data is collected and analysed (2009, p.130).

In addition, comparative methods will be used to examine the judiciary's reaction by observing whether the presence of the military in the state makes a difference to the way in which the judiciary resolves cases, and its general views on offending, offenders and criminal justice policies.



The data analysis will involve: an overall examination in order to identify biases and general impressions through the different data; coding the data into themes and categories which may be informed by the content and also by the theory used; identifying patterns and interconnections between the different themes and categories; mapping and building the themes and developing these in relation to the literature and theories used such as CLE, and drawing conclusions from the findings (O’Leary, 2010).

**MEASURES TO BE USED** – Confirm that any measures (such as tests/questionnaires) employed in the research study will be used in accordance with any copyright or licensing conditions that apply. YES NA

Further, confirm that the researcher administering these measures is qualified to do so (for example, in cases where only registered practitioners are able to administer such a measure). YES NA

## 5. PARTICIPANTS TO BE STUDIED

### 5.1 PROJECTED NUMBER OF PARTICIPANTS

Number: 20–35 If applicable: How many will be male and female.

Justification for the sample size: Twenty to thirty five interviews may bring enough data to obtain an in-depth understanding of the Federal judiciary’s views and the ways these are reflected on cases, while bearing in mind the context that may inform such views. It is considered feasible for the investigator to conduct these interviews in a period of 6 to 8 months which involve travelling from Mexico City to two different sites (XXX and XXX).

The lower age limit will be assumed to be 16 years of age unless specified otherwise. If an upper age limit is needed you must provide a justification.

Upper Age Limit: N/A Lower age limit: 16

### 5.2 SELECTION CRITERIA

The main interest lies within the judiciary therefore any member of the Federal judiciary is considered a good candidate for interviewing. However, the selection criteria extends to other criminal justice officials, particularly court officials, and to any individual who are familiar with criminal justice issues including journalists, NGOs, and scholars. As a result, purposive sampling applies to the Federal judiciary, but the approach used to access all interviewees is of snowballing.

### 5.3 RECRUITMENT

*Describe how participants will be (i) identified and (ii) approached.*

#### Identification

Participants, namely, judges, defence lawyers, prosecutors, members of NGOs, academia and any other practitioner who is familiar with the criminal justice system in Mexico are eligible. Personal and professional contacts of the researcher will be a starting point to access further participants following a snowballing strategy.

### Approach

The strategy in approaching the different interviewees is twofold. On the one hand, the researcher will use her personal and professional networks described above in order to gain access with the different interviewees. The university (CIDE) where she will be based during her field work has a strong relationship with several members of the Federal judiciary which may also prove useful when looking for access.

On the other hand, the researcher will visit the courts and tribunals directly in order to schedule an appointment with the judge's secretary. This will allow the researcher to express the aims of the interview and of the research by leaving an Information Sheet (see below) and/or expressing them orally to the interviewee.

Based on the working experience of the researcher which includes working as a court clerk in a Federal criminal court, she considers that visiting the courts and tribunals personally may be a feasible strategy to schedule an appointment with the judge or with any other criminal justice official.

### 5.4 LOCATION

State where the work will be carried out e.g. public place, in researcher's office, in private office at organisation.

The interviews will be conducted in the office of the participant or in any other public space suggested by the participant. The researcher while doing the field work will be based in her former university, CIDE (Centre of Research and Economic Teaching) located in Mexico City.

## ETHICAL CONSIDERATIONS

### 6.1 INFORMED CONSENT

*Describe the process you will use to ensure your participants are freely giving fully informed consent to participate. This will always include the provision of an information sheet and will normally require a consent form unless it is a purely self-completion questionnaire based study or there is a justification for not doing so (this must be clearly stated). Templates for these are at the end of this document and they should be filled in and modified where necessary.*

#### Information Sheet

Potential interviewees will be provided with the information sheet, which includes the information about aims of the research, principal research questions, who will get access to the information (i.e. my supervisors and me), and the explicit right of withdraw from the interview at any time. Also, participants will be given enough time not less than 24 hours to read and understand the information sheet prior to the interview.

In addition to the Information Sheet, if it deemed necessary the researcher will explain orally the participant the aims of this study, together with the main motivation of the research. Different arrangements to ensure anonymity and confidentiality will be also described.

#### Consent form

Explicit consent from interviewees will be required after having explained thoroughly the research aims, together with the way in which confidentiality and participant's anonymity is kept.

The researcher will act in compliance with King's College regulation, the Socio-Legal Studies Association Statement of Principles of Ethical Research Practice, the Data Protection Act and the applicable Mexican law in order to protect research participants' anonymity, rights and privacy

## 6.2 RIGHT OF WITHDRAWAL

Participants should be able to withdraw from the research process at any time and also should be able to withdraw their data if it is identifiable as theirs and should be told when this will no longer be possible (e.g. once it has been included in the final report). Please describe the exact arrangements for withdrawal from participation and withdrawal of data depending on your study design).

Potential participants will be made aware with the Information Sheet and orally before the interview that their participation is voluntary, that they are under no obligation to participate in the research project and that they are free to withdraw from participating at any time, as well as to withdraw any comments or/and go off-record during the interview without giving reasons and without any consequences.

The researcher will offer the participants the option of reading and reviewing the transcription of the interview and in any case withdraw any comments. If so, the transcript will be delivered directly to the respondent, for him or her to approve and return to the researcher personally. Also, interviewees will be made aware that they may withdraw any data after the interview took place until 31 July 2013. Upon this instruction the researcher will cease to use this information and withdraw it from the analysis.

## 6.3 RISK CHECKLIST

Where you have ticked 'Yes' on the risk checklist, provide details of relevant qualifications and experience with reference to those sections. This must include the researcher and/or supervisor as well as other collaborators (if applicable) involved in those sections marked as presenting risk. (Do not submit a c.v.)

N/A

You must also specifically address the ethical issues raised from those sections here.

NB: If you ticked yes to any point in F i -v of the checklist, you must also complete and submit Section B of the application form.

## 6.4 OTHER ETHICAL ISSUES

*Please consider whether there are other ethical issues you should be covering here. Please note that all research projects have some ethical considerations, even if this only relates to how confidentiality will be maintained. DO NOT LEAVE THIS SECTION BLANK.*

### Anonymity

All participants will be kept anonymous and only age group, gender and their institutional affiliation (i.e. their position held within their institution). In particular, the names of the court officials will not be recorded but only the type of court they work at will be referred to, considering that there are several judges holding the same positions. The information will only be registered if ensures that the data collected and the respondent remain unlinked.

### Confidentiality

Throughout the entire process of this study, the researcher will endeavour to maintain the confidentiality of all the participants' responses and data gathered.

The interview will be either taped, if interviewees agree, or recorded with note-taking. The recording and other materials will be stored in an encrypted and password protected hard disk in the researcher's personal computer. All gathered and collected materials will be secured until the research is completed. Recorded materials will be destroyed after these have been transcribed and all written transcriptions will be destroyed after three years of the completion of the study.

Only the researcher and her supervisors will consult the data gathered which excludes any other person or agency, including the funding agency (CONACYT), from accessing the evidence collected.

Further, if applicable, please also add the professional code of conduct you intend to follow in your research. <http://www.kcl.ac.uk/research/ethics/training/codes.html>

## **6.5 BENEFITS & RISKS**

Please describe any expected benefits and risks to the research participant.

For example:

Will participants receive a copy of the final report?

What is the potential for adverse effects resulting from study participation, e.g.

- participants suffering pain, discomfort, distress, inconvenience or changes to lifestyle.
- sensitive, embarrassing or upsetting topics being discussed/raised.

Identify the potential for each of above and state how you will minimise risk and deal with any untoward incidents/adverse reactions.

### Expected benefits

There are no direct benefits that follow from participating in this study. However, an indirect benefit may be to have the opportunity to reflect and talk about own experiences and general views. Also, taking part in this research implies to participate in a project which aims to contribute to the Rule of Law through deeper understanding of criminal justice institutions.

### Potential risks

The potential adverse effects that may derive from participating in this study participation are limited because the participant can withdraw freely from the interview at any point or refuse to answer any questions asked.

In addition, only motivations about passed or decided cases may be addressed, leaving aside any cases which are pending to be resolved. Given that judicial decisions contained in cases files are considered public information under the Mexican Transparency Act, the consultation and examination of these files in their public version (namely, scrapping personal details of the parties involved) are considered to contain non-sensitive information and thus, involving no particular risk.

Furthermore, the main interest lies in the motivations, views and understandings of the judiciary while managing and deciding criminal cases, therefore, do not involve any issues related to criminal activities.

<b>6.6 CRIMINAL OR OTHER DISCLOSURES REQUIRING ACTION</b>
Is it possible that criminal or other disclosures requiring action (e.g. evidence of professional misconduct) could be made during this study?
YES NO
If yes, detail what procedures will be put in place to deal with these issues. The Information Sheet should make it clear under which circumstances action may be taken by the researcher.
<b>7 FINANCIAL INCENTIVES, EXPENSES AND COMPENSATION</b>
7.1 Will travelling expenses be given? If yes, this should be stated on the Information Sheet
YES NO
7.2 Is any reward, apart from travelling expenses to be given to participants? If yes, please provide details and a justification for this. It is recommended that participants are informed of the compensation on the information sheet.
YES NO
7.3 Is the study in collaboration with a pharmaceutical company or an equipment or medical device manufacturer? If yes, please give the name of the company and indicate what arrangements exist for compensating patients or healthy volunteers for adverse effects resulting from their participation in the study (in most cases, the Committee will only approve protocols if the pharmaceutical company involved confirms that it abides by APBI (The Association of the British Pharmaceutical Industry) guidelines. A copy of the indemnification form (Appendix C) should be submitted with the application.
YES NO
7.4 No fault compensation scheme If your study is based in the UK you must offer the No-fault compensation scheme to participants unless there is a clear justification for not doing so (if this is the case this must be stated and you should bear in mind that the Sub-Committee reserves the right to make this a condition of approval).
YES, I am making the scheme available to participants
NO, the study is based outside the UK and so the scheme is not applicable
NO, the study is within the UK but the No-fault compensation scheme is not offered for the following reason:
<b>8. DATA PROTECTION, CONFIDENTIALITY, AND DATA AND RECORDS MANAGEMENT</b>
8a. Confirm that all processing of personal information related to the study will be in full compliance with the Data Protection Act 1998 (DPA) including the Data Protection Principles).
If you are processing any personal information outside of the European Economic Area you must explain how compliance with the DPA will be ensured.
YES NO
In addition, this study will be conducted in compliance with the Mexican personal data legislation (Personal Data Protection Act 2010).

8b. What steps will be taken to ensure the confidentiality of personal information? Give details of anonymisation procedures and of physical and technical security measures. Please note to make data truly anonymous all information that could potentially identify a participant needs to be removed in addition to names. NB: Personal data held on mobile devices must be encrypted ([http://www.kcl.ac.uk/college/policyzone/assets/files/information\\_policies/Encryption%20Policy%2020100513FINALv1%20\(2\).pdf](http://www.kcl.ac.uk/college/policyzone/assets/files/information_policies/Encryption%20Policy%2020100513FINALv1%20(2).pdf)).

#### Anonymity

All participants will be kept anonymous and only age group, gender and their institutional affiliation, as described above. In particular, the information registered concerning institutional affiliation will leave aside any data which may facilitate identifying the participant.

The only place where their name will appear is in the written consent form which in itself will not be sufficient to link the participant to the interview content, including their comments and responses.

During the interview, personal information of a participant (i.e. name) will not be mentioned in order to maintain the anonymity.

#### Security measures

Digital recording materials will be stored in a mobile U disk that will be encrypted, and will be erased after they have been transcribed. All electronic data held in any mobile devices will be stored in a hard disc which will also be encrypted.

8c. Who will have access to personal information relating to this study? Confirm that any necessary wider disclosures of personal information (for instance to colleagues beyond the study team, translators, transcribers auditors etc) have been properly explained to study participants. Further guidance on the above issues can be found at the following link: <http://www.kcl.ac.uk/research/ethics/training/feedback.html>

Only the researcher and her supervisors (Prof. Benjamin Bowling and Prof. Penny Green) and any other person or agency is excluded from accessing the evidence collected.

8d. Data and records management responsibilities during the study. The 'Principal Investigator' is the named researcher for staff projects and the supervisor for student projects.

I confirm that the Principal Investigator will take full responsibility for ensuring appropriate storage and security for all study information including research data, consent forms and administrative records and that, where appropriate, the necessary arrangements will be made in order to process copyright material lawfully.

YES NO

Further, provide a specific location at which research data will be stored during the study.

During my fieldwork in Mexico and further period of analysis, digital research data will be stored in a hard disk that is encrypted and kept in a locked place in Mexico. Other materials, including consent forms and administrative records will be stored in a secured locked storage cabinet at the researcher's home in Mexico.

8e. Data management responsibilities after the study.

*State how long study information including research data, consent forms and administrative records will be retained, what format(s) the information will be kept in and where the data will be stored. For example, where within King's College London? (<http://www.kcl.ac.uk/iss/igc/tools/researchers.html>)*

Any electronic and written or physical materials including consent forms, administrative records, voice recording (mobile USB disk), records of the interview, interview transcriptions and translation materials related to the interviews will be retained in a safe locked storage to which only the researcher may access in her home in Mexico.

Tape recorded materials will be destroyed after they have been transcribed in order to avoid the risk of identifying participants by their voice, and all gathered materials including the transcription of the interviews will be destroyed three years after the completion of the study.

NB: Any personally identifiable data that is held on any mobile device should be encrypted. This includes data stored on USB keys, laptop/netbooks, desktop computers, smart phones, workgroup servers and relevant emails.

In addition, confirm whether the storage arrangements comply with the Data Protection Act 1998 and the College guidelines.

YES NO

Will data be archived for use by other researchers?  
NO

YES (in anonymised form) If you intend to share anonymised data with other researchers, you must make this clear on the information sheet.

YES (in identifiable form following the guidance below)

Will any personal information related to this study be retained and shared in unanonymised form? If you tick yes you must ensure that these arrangements are detailed in the Information Sheet and that participant consent will be in place.

YES NO

## 9. AUTHORISING SIGNATURES

### 9.1 RESEARCHER/APPLICANT

I undertake to abide by accepted ethical principles and appropriate code(s) of practice in carrying out this study. The information supplied above is to the best of my knowledge accurate. I have read the Application Guidelines and clearly understand my obligations and the rights of participants, particularly in so far as to obtaining valid consent. I understand that I must not commence research with human participants until I have received full approval from the ethics committee.

Signature ..... Date.....



9.2 SUPERVISOR AUTHORISATION FOR STUDENT PROJECTS (including PhD)		
<p>I confirm that I have read this application and will be acting as the student researcher's supervisor for this project. The proposal is viable and the student has appropriate skills to undertake the research. The Information Sheet and recruitment procedures for obtaining informed consent are appropriate and the ethical issues arising from the project have been addressed in the application. I understand that research with human participants must not commence without full approval from the ethics committee.</p> <p><u>If applicable:</u></p> <p>The student has read an appropriate professional code of ethical practice</p> <p>The student has completed a risk assessment form</p> <p>Name of Supervisor: Prof. Benjamin Bowling</p> <p>Signature ..... Date.....</p>		
9.3 MEDICAL SUPERVISION (if appropriate – see the Guidelines)		
<p>Name of Medical Supervisor:</p> <p>Medical Supervisor's MDU/MPS (or other insurance provider) number:</p> <p>.....</p> <p>Signature of Medical Supervisor:</p> <p>..... Date.....</p>		
10. INFORMATION SHEET AND CONSENT FORM		
<p>Remember to submit your information sheets for participants and consent form (if necessary) with your application. Failure to do so will cause delays to your applications.</p> <p>The information sheet for participants should be composed according to the guidelines. The text in red should be deleted or modified as appropriate. If the language in the template is not suitable for your intended participant group it can be modified. There is also a template consent form that can be used. Please refer to the guidelines for further information on how these documents should be used.</p>		
Submission Checklist	Tick box	
Section A Application Form		
Section B Application Form (where applicable)		
Information Sheet		
Consent Form (where applicable)		
Recruitment Documents (eg recruitment email, posters, flyers or advertisements)		
Measures to be used (eg questionnaires, surveys, interview topic guides/schedules as appropriate)		
Approach letters to 'gatekeeper' organisations (where applicable)		
Evidence of any other approvals or permissions (where applicable)		

## INFORMATION SHEET FOR PARTICIPANTS

REC Protocol Number:

Title: Mexican criminal policy and its effects on the judiciary

I would like to invite you to participate in this postgraduate research project which I am conducting as a King's College PhD researcher. You should only participate if you want to; choosing not to take part will not disadvantage you in any way. Before you decide whether you want to take part, it is important for you to understand the aims pursued by this research and what your participation will involve. Please take time to read the following information carefully and discuss it with others if you wish. Ask us if there is anything that is not clear or if you would like more information.

### 1. Aims of the research

In the past 15 years, Mexican criminal policies and regulations have undergone deep changes which advance a pre-emptive and proactive approach towards criminality. This research is a case study on the judiciary and its different responses and views on the current developments of Mexican criminal policies and socio-political context, through the management of criminal cases. The primary aim of the project is exploratory as it seeks to capture the judges' experiences and opinions regarding criminality, punishment and other broad issues concerning criminal justice and the judicial role.

### 2. Motivations to pursue this research

This study pursues the academic interest of increasing the understanding of the impact of current criminal policies, focusing on the judiciary, on both their decisions and their own views and understandings. Its main motivation is to contribute to a better understanding of the complex social and political landscape which Mexico faces and of the policy choices made in the last 15 years.

### 3. Participants and the main interview questions

I will be interviewing current and former criminal justice officials, primarily Federal judges, as well as members of NGOs, academics, journalists and any person who has knowledge on the current socio-political context.

The interviews will touch upon: the relevance of safety as a motivation for the infliction of punishment; the main purposes of punishment; the different motivations and thresholds for issuing pre-emptive measures, and the ways in which the offender is understood and referred to. In addition, broader questions concerning the general context will be raised, touching on issues such as pre-emptive and proactive approaches to criminality, the participation of the military in crime control policies, and the role of the judiciary within the criminal justice system.

### 4. What will happen if the participant agrees to take part?

Participation is entirely voluntary. If the participant, after reading the Information Sheet and heard the general aims of the research has agreed to take part, an interview will be scheduled. The interview will last approximately 60 to 90 minutes, will be carried out in your place of work (or another venue convenient for you) and during working hours. Participating may represent an opportunity to share your views and opinions on criminal justice issues.

#### 5. Arrangements for ensuring anonymity and confidentiality

Throughout the entire process of this study, the researcher maintains anonymity and confidentiality of all the participants and of the data gathered.

In regards to the participants' personal information, only age group, gender and the type and position he or she holds within an institution. The measures to guarantee confidentiality involve securing all gathered and collected materials within a secure cabinet and digital data in an encrypted mobile device within a locked cabinet. Recorded materials will be destroyed after these have been transcribed by the researcher and all written transcriptions will be destroyed after three years of the completion of the study.

Only the researcher and her supervisors may consult the information. Although extremely unlikely you find that this study has harmed you in any way, you may contact King's College London using the details below for further advice and information:

Thank you for taking the time to consider taking part in this study.

#### *Researcher:*

Ana Cardenas

Address: School of Law, King's College London

Strand, London WC2R 2LS (UK)

Telephone Number: 004420 7848 2265

Email: [ana.cardenas\\_gonzalez\\_de\\_cosio@kcl.ac.uk](mailto:ana.cardenas_gonzalez_de_cosio@kcl.ac.uk)

#### *First Supervisor:*

Professor Benjamin Bowling

SW2.18, School of Law,

King's College London

Strand, London WC2R 2LS (UK)

Telephone: 004420 7848 2265

Email: [ben.bowling@kcl.ac.uk](mailto:ben.bowling@kcl.ac.uk)

#### *Second Supervisor:*

Professor Penny Green

SW2.07, School of Law,

King's College London

Strand, London, WC2R 2LS (UK)

Telephone: 004420 7848 2265

Email: [penny.green@kcl.ac.uk](mailto:penny.green@kcl.ac.uk)

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## CONSENT FORM FOR PARTICIPANTS IN RESEARCH STUDIES

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Please complete this form after you have read the Information Sheet and/or listened to an explanation about the research.

Title of Study: The Mexican criminal policy and its effects on the judiciary

King's College Research Ethics Committee Ref: \_\_\_\_\_

- Thank you for considering taking part in this research. The person organizing the research must explain the project to you before you agree to take part.
- All gathered information will maintain anonymity, and only age, gender and institutional affiliation will be recorded. The information gathered will be confidential and may only be consulted and processed by the researcher and her supervisors.
- If you have any questions arising from the Information Sheet or explanation already given to you, please ask the researcher before you decide whether to join in. You will be given a copy of this Consent Form to keep and refer to at any time.
- I understand that if I decide at any time during the research that I no longer wish to participate in this project, I can notify the researchers involved and withdraw from it immediately without giving any reason. Furthermore, I understand that I will be able to withdraw my data up to 31 July 2013.
- I consent to the processing of my personal information for the purposes explained to me. I understand that such information will be treated in accordance with the terms of the Data Protection Act 1998, the Mexican personal data protection Act (2010) and it will not be possible to identify me from any material.
- I consent to my interview being audio recorded.

Participant's Statement:

I \_\_\_\_\_

agree that the research project named above has been explained to me to my satisfaction and I agree to take part in the study. I have read both the notes written above and the Information Sheet about the project, and understand what the research study involves.

Investigator's Statement:

I \_\_\_\_\_

confirm that I have carefully explained the nature, demands and any foreseeable risks (where applicable) of the proposed research to the participant.

Signed

Date

REC Número de Protocolo:

Título: La política criminal mexicana y sus efectos en el Poder Judicial Federal

Lo invito a participar en este proyecto de estudios de doctorado que estoy realizando como investigadora de la universidad King's College. Su participación es completamente voluntaria y si optara no participar no hay implicación o desventaja alguna. Previo a decidir participar es importante que tenga conocimiento de las razones y objetivos que tiene esta investigación así como la los términos de su participación. Por ello, le pido se tome el tiempo de leer la siguiente información de forma cuidadosa, y si así lo desea comente o delibere con terceros y plantéenos cualquier duda o comentario.

1. Propósitos de la investigación

En los últimos 15 años, las políticas criminales y regulaciones han sufrido cambios estructurales caracterizados por un enfoque preventivo y proactivo hacia la criminalidad. Esta investigación es un caso de estudio sobre el Poder Judicial Federal y sus distintas respuestas, reacciones y perspectivas acerca de estos cambios, así como del contexto socio-político reciente, a través de su administración de asuntos penales. El objetivo primordial de esta investigación es explorar y capturar las experiencias y visiones de los juzgadores acerca de la criminalidad, el castigo y otros temas relativos a la materia criminal y a la función judicial.

2. Motivaciones para realizar esta investigación

Esta investigación busca analizar el impacto de las políticas criminales actuales, concentrándose tanto en las opiniones como en las resoluciones emitidas por el Poder Judicial Federal. La motivación principal es contribuir al análisis y estudio, a partir de la perspectiva del juzgador federal, del entorno social y político que enfrenta México en materia de justicia criminal, a partir de las distintas políticas públicas de los últimos 15 años en materia de justicia criminal.

3. Participantes y ejes principales de la investigación

Se entrevistará a personas con experiencia laboral en áreas e instituciones relacionadas con la materia de justicia criminal, incluyendo jueces, agentes del Ministerio Público, abogados defensores, miembros de organizaciones de la sociedad civil, académicos, periodistas, así como cualquier persona con experiencia o conocimiento en esa materia, así como en aspectos diversos del contexto social y político actual.

Los ejes temáticos de las entrevistas son: la relevancia de la seguridad como motivación en la imposición de una pena, así como los propósitos que la pena persigue; las distintas motivaciones para emitir órdenes de cateo y de arraigo, así como la forma como el (posible) delincuente es concebido. Asimismo, ejes temáticos más amplios tratarán sobre el contexto general, incluyendo los enfoques preventivos y proactivos hacia la criminalidad, la participación activa del ejército y las fuer-

zas armadas en políticas de criminalidad, así como el rol que desempeña el juez dentro del sistema de justicia penal.

4. ¿Qué sucede si el posible participante acepta participar?

La participación es enteramente voluntaria. Si el participante después de leer la presente Hoja Informativa y ha escuchado las características principales de esta investigación, se agendará una entrevista. La entrevista tendrá una duración de 60 a 90 minutos y se llevará a cabo en su lugar de trabajo (o en otro espacio que le parezca más conveniente) y durante horas hábiles. Participar representa una oportunidad para que la visión y opinión de los participantes acerca de aspectos de justicia penal se puedan capturar.

5. Medidas para garantizar anonimato y confidencialidad

Durante todo el proceso de elaboración de este estudio, la investigadora mantendrá el anonimato y confidencialidad de todos sus participantes y de la información recolectada.

Respecto de información y datos personales de los participantes, sólo se registrará el grupo de edad, género y el tipo y el cargo que ostenta dentro de su institución de trabajo, dejando fuera toda información que impida u obstaculice el anonimato del participante. Las medidas para garantizar la confidencialidad incluyen: resguardar bajo llave todos los materiales e información recolectada, y guardar la información digital en un disco duro encriptado, igualmente resguardado bajo llave. Los materiales grabados serán destruidos después de haber sido transcritos por la investigadora y todas las transcripciones serán destruidas después de tres años de haber completado la investigación.

La consulta y procesamiento de la información recolectada solo podrá ser consultada por la investigadora y sus asesores, Prof. Benjamin Bowling y Prof. Penny Green.

En caso de que resienta algún tipo de efecto o consecuencia cualquiera, podrá contactar la universidad King's College London utilizando los datos siguientes:

Gracias por su atención y tiempo para considerar participar en esta investigación.

*Investigadora:*

Ana Cárdenas González de Cosío  
Address: School of Law, King's College London  
Strand, London WC2R 2LS (UK)  
Telephone Number: 004420 7848 2265

Email: [ana.cardenas\\_gonzalez\\_de\\_cosio@kcl.ac.uk](mailto:ana.cardenas_gonzalez_de_cosio@kcl.ac.uk)

*Primer Asesor:*

Professor Benjamin Bowling  
SW2.18, School of Law,  
King's College London  
Strand, London WC2R 2LS (UK)  
Telephone: 004420 7848 2265  
Email: [ben.bowling@kcl.ac.uk](mailto:ben.bowling@kcl.ac.uk)

*Segundo Asesor:*

Professor Penny Green  
SW2.07, School of Law,  
King's College London  
Strand, London, WC2R 2LS (UK)  
Telephone: 004420 7848 2265  
Email: [penny.green@kcl.ac.uk](mailto:penny.green@kcl.ac.uk)

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## FORMA DE CONSENTIMIENTO PARA PARTICIPANTES EN ESTUDIOS DE INVESTIGACIÓN

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Favor de completar esta forma después de haber leído la Hoja de Información y/o escuchado la breve explicación sobre la presente investigación.

Título de la Investigación:

Número de referencia del Comité de Ética de la Universidad King's College London: \_\_\_\_\_

- Gracias por considerar participar en la presente investigación. La persona responsable deberá explicar el contenido y propósito de la investigación previo a aceptar participar.
- Toda la información recabada conservará el anonimato del participante, en donde sólo se registrará la edad, el sexo y la posición o cargo asignado. La información será tratada con absoluta confidencialidad y sólo podrá ser consultada y procesada por el investigador y su asesor.
- Si tiene alguna pregunta derivada de la Hoja de Información o de la explicación, le suplico se las planté al investigador previo a que acepte a participar. Se le proporcionará una copia de esta Forma de Consentimiento.
- Yo entiendo que podré retirar mi consentimiento de participar en este proyecto en cualquier momento de la entrevista y de la investigación, sin explicación alguna. Asimismo, entiendo que podré retirar la información proporcionada hasta el 31 de julio de 2013.
- Yo otorgo mi consentimiento para que la información personal sea procesada de la forma y con el propósito establecido. Entiendo que esa información será tratada de conformidad con la legislación inglesa aplicable (Data Protection Act 1998) y la Ley Federal de Protección de Derechos Personales y no será posible identificarla dentro de cualquier investigación.



Declaración del Participante:

Yo \_\_\_\_\_

Declaro que el proyecto de investigación bajo el título mencionado ha sido explicado de forma exhaustiva y estoy de acuerdo en participar en esta investigación. He leído y entiendo los términos establecidos anteriormente, así como la Hoja de Información respecto de lo que esta investigación comprende.

Declaración del Investigador:

Yo \_\_\_\_\_

Confirmo que he explicado con cuidado la naturaleza, así como los objetivos de esta investigación al participante.

Firma

Fecha

## Interview Schedule for Mexican Judges

Topic: conception or understanding of a tried person

1. How do you see or conceive a tried person? (For example, as a vulnerable or disadvantaged person, as a risk to society, as an enemy to society, as a source of danger, etc.)
2. In your opinion, what influences this understanding?
3. Do you think this understanding has changed in the past years?

Topic: due process

1. How do you understand the principle of presumption of innocence?
2. In your opinion, is this principle applied during criminal proceedings?
3. In your opinion, has the way of managing proceedings been affected in any way by the army's increasing participation in public safety matters? (For example, in aspects related to crime investigation, production of evidence, etc.)
4. There are some who deem the Federal law against organised crime an illustration of enemy penology, what is your opinion in this regard?

Topic: sentencing

1. In your opinion, what goal does the sentence pursue, in other words, what objective does the sentence should achieve?
2. In your opinion, do you think is objective or goal is achieved?
3. At the moment of imposing the sentence, what aspects or elements must a judge consider?
4. In practice, what are the decisive aspects?

## Interview Schedule for Mexican Public Attorneys

Topic: main duties and current context

1. What are the main aspects of your job?
2. What are the most common types of cases that you manage? (type of offence, circumstances of the offence, suspects' personal characteristics)
3. Have any aspects of your job in general changed in the past few years?
4. In an institutional level, have you seen any changes in the past few years?

Topic: proceedings

1. During proceedings, what contact do you have with the judge? How does the judge treat a person facing trial? In your opinion, what may influence this treatment?
2. When the judge issues a conviction against your client, in your opinion what influences this decision? What aspects do you believe are decisive?
3. In your opinion, is the principle of presumption of innocence applied? What influences its effective or ineffectiveness?
4. In your opinion, have proceedings been affected in any way by the army's increased participation in public safety matters? (aspects related to crime investigation, evidence production)

Topic: sentencing

1. In regards to your cases, how severe or lenient are sentences? Has the way to sentence changed in the past few years?
2. What aspects or elements does the judge consider when imposing a sentence? In practice, what are the decisive elements?

## Interview Schedule for the Public Attorneys' Delegate

### Topic: institutional design

1. What are the main duties of a Delegate?
2. What is the main institutional design of the Federal Institute of Public Attorneys in the state? (how many public attorneys are there per prosecution office and court)
3. Has there been any changes in the past few years?
4. Is there any scheme of assistance with state or federal authorities?

### Topic: public attorneys' duties

1. What are the general duties of a public attorney?
2. What the average caseload a public attorney manages?
3. What are the main aspects of the professional career of a public attorney (what is the average duration, what are a public attorney's motives to begin or conclude her/his career as a public attorney)

### Topic: criminality and profile of detainees in the state

1. What are the most common offences?
2. What are the detainees' most frequent characteristics?
3. Has the type of offending or/and detainees' characteristics changed in the past few years?
4. In case of there being any changes, have these lead to an adaptation or change in the duties performed by public attorneys?

## Interview Schedule for members of civil society

### Topic: main duties and current context

1. What are the main aspects of your job?
2. What are the most common types of cases that you manage? (type of offence, circumstances of the offence, suspects' personal characteristics)
3. Have any aspects of your job in general changed in the past few years?
4. In an institutional level, have you seen any changes in the past few years?

### Topic: proceedings

1. During proceedings, with what authorities do you have to meet and discuss your cases?
2. Could you describe the contact and treatment that you receive from these authorities?
3. In your opinion, is the principle of presumption of innocence applied? What influences its effective or ineffectiveness?
4. In your opinion, have proceedings been affected in any way by the army's increased participation in public safety matters? (aspects related to crime investigation, evidence production)

### Topic: sentencing

1. In regards to your cases, what are the main characteristics of the sentences imposed to your clients?
2. Have you noticed any change in sentencing, either in its severity or the type of sentence?



## APPENDIX 2

# Coding tree for interview analysis

The main themes of the coding tree were: understanding of the offender, due process, enemy penology, the military, the judiciary and sentencing. Each of these disentangled in several ramifications all of which are mentioned and described in the table below which is the analytic structure of the nodes used with Nvivo.

The following table describes the different nodes and the Description of the analytic structure used with Nvivo.

1 <sup>st</sup> level of node	2 <sup>nd</sup> level of node	3 <sup>rd</sup> level of node	Description of the last node
1. Conceptualising the offender	1.1. Related to personal aspects		Comments describing defendants' personal features.
	1.2. Related to procedural aspects		Comments describing defendants linked to criminal proceedings.
2. Due process	2.1 Presumption of innocence	2.1.1. Legal and dogmatic definition of presumption of innocence	Comments describing the principle based on the Constitution, the Supreme Court's interpretation.
		2.1.2. Effective presumption of innocence	Comments referring to how a particular judge/magistrate applies the principle in practice)
		2.1.3. Non-effective presumption of innocence	Comments describing what hampers presuming an offender innocent
	2.2. Quality of the Prosecution	2.2.1. Positive aspects of the Prosecution's work (i.e. case, investigation)	Comments describing the good quality of the prosecution's job at pre trial and trial proceedings.
		2.2.2. Ineptitude and deficiency	Comments describing the bad quality of the prosecution's job.
		2.2.3. Lack of controls applied by the prosecution	Comments referring to illegal and arbitrary practices carried out by law-enforcement agents the police and military remain unpunished.

1 <sup>st</sup> level of node	2 <sup>nd</sup> level of node	3 <sup>rd</sup> level of node	Description of the last node
		2.2.4. Procedural features linked to prosecutors	Comments referring to procedural rules that link the prosecution.
	2.3. Custodial remand	2.3.1. Practices regarding custodial remand	Comments describing how is it used in practice, for example, the great majority face the trial while held in prison.
		2.3.2. Defence of the use of custodial remand	Comments explaining why it is beneficial to use this measure.
		2.3.3. Criticisms against custodial remand	Comments explaining why it is negative to use this measure.
		2.3.4. Current practices linked to custodial remand	Comments describing custodial remand in practice.
	2.4. Evidence	2.4.1. Evidence collection	Comments describing the prosecution's, police's or military's tasks at collecting evidence.
		2.4.2. Evidence quality	Comments describing different aspects concerning ways -legal or illegal- in which evidence was produced.
		2.4.3. Weighing evidence	Comments explaining the ways in which judges weigh the evidence produced by the parties.
		2.4.4. Rules and principles guiding evidence collection and pondering	Comments explaining the rules and principles which guide evidence aspects.
	2.5. Mistreatment and unlawful practices		Comments explaining cases or incidents linked to mistreatment and unlawful state agents' behaviour.
	2.6. Defence		Comments that concerned the defence's performance.
	2.7. Arraigo	2.7.1. Views in favour of arraigo	Comments in favour of arraigo orders.
		2.7.2. Views against arraigo	Comments against arraigo orders.
3. Enemy penology	3.1. Perspectives towards enemy penology		General opinions about enemy penology model and its application in the Mexican legal system.

1 <sup>st</sup> level of node	2 <sup>nd</sup> level of node	3 <sup>rd</sup> level of node	Description of the last node
	3.2. Judiciary's role in an enemy penology paradigm		Reactions towards asking them what role should be carried out by judges in an enemy penology paradigm.
	3.3. Enemy penology and traditional penology		Comments describing the traditional criminal justice system that included enemy penology's features.
	3.4. Offenders understood as enemies	3.4.1. General comments	Comments on treating or seeing a type of defendants as enemies (including organised crime offences).
		3.4.2. Offenders concerning drugs offences	Comments touching upon the different types of treatment to offenders charged for drug offences.
4. Military	4.1. Military's participation in public safety matters	4. 1. 1. Effects on legislation	Comments linking the participation of the army in changes in state criminal legislation.
		4.1.2. Effects on safety	Comments linking the participation of the military and any effects in perception of safety.
		4.1.3. False positives	Comments describing false positives committed by the military.
		4.1.4. Society's feelings towards the military	Comments describing society's response to the military's presence.
	4.2. Effects of the military in proceedings	4.2.1. General perceptions about their effect	Comments describing any sort of effect, if any, on proceedings.
		4.2.2. Operational or technical effects in the proceedings	Comments explaining the different ways in which the proceedings have changed, including the military collecting evidence, among others.
5. Judiciary	5.1. Judges	5.1.1. Role and self-perception of the judiciary	General comments on the judiciary's characteristics.



1 <sup>st</sup> level of node	2 <sup>nd</sup> level of node	3 <sup>rd</sup> level of node	Description of the last node
		5.1.2. Independence of the judiciary	Comments describing the judiciary's independence in regards to other branches of government.
		5.1.3. Judicial impartiality and the defendant	Comments concerning staying impartial when trying defendants.
		5.1.4. Judicial impartiality and insecurity	Comments and reactions towards insecurity in general or unsafe environments.
		5.1.5. Judicial training	Comments linked judges' training
	5.2. Administrative policies concerning the judiciary		Comments regarding ways and policies in which the judiciary's administrative council affects judicial decision making.
6. Sentencing	6.1. Factors affecting the type or severity of the sentence	6.1.1. Past convictions	Comments linking past convictions to the way in which the sentence is determined.
		6.1.2. Offenders' personal aspects	Comments linking general offender's characteristics to the way in which the sentence is determined.
		6.1.3. Victimisation	Comments linking the way in which the victim was affected or harmed with the sentence imposed.
		6.1.4. Age	Comments linking age to the sentence imposed.
		6.1.5. Ways in which the offence was committed	Comments linking the ways in which the offence was committed and the sentence.
		6.1.6. Offender's behaviour when offended	Comments linking the ways in which the offender participated in the offence, and the sentence.
		6.1.7. Dangerousness	Comments relating dangerousness to the sentence.
		6.1.8. Degree of the harm done	Comments relating to the harm done.

1 <sup>st</sup> level of node	2 <sup>nd</sup> level of node	3 <sup>rd</sup> level of node	Description of the last node
		6.1.9. Other	Comments mentioning other themes linked to the sentence.
	6.2. Changes in sentencing	6.2.1. Rises in sentencing	Comments referring to generalised rises in sentencing tariffs
		6.2.2. Falls in sentencing	Comments referring to generalised falls in sentencing tariffs
	6.3. Sentencing effects	6.3.1. Prisons as schools of crime	Comments describing imprisonment as a place where offenders learn more on criminality rather than rehabilitate.
		6.3.2. Effects of punishment on the offenders' families	Comments highlighting the ways in which families are affected by their relative's sentence.
		6.3.3. Offenders' views on the effect of punishment	Comments describing what offenders had told them regarding the effect, if any, of prison, and particularly on rehabilitation.
		6.3.4. Lack of enforcement of rehabilitation purposes	Comments referring to the different aspects of rehabilitation that fail to be enforced.
		6.3.4. General negative effects	Comments arguing against prison as punishment and in favour of other non-custodial sentences.
	6.4. Sentencing goals	6.4.1. Retributive	6.4.1.1. Retribution. Comments on retributive purposes of the sentence.
			6.4.1.2. Proportionality. Comments on proportional sentences.
		6.4.2. Utilitarian	6.4.2.1. Deterrence or general prevention. Comments on special prevention purposes of the sentence.
			6.4.2.2. Rehabilitation or special prevention. Comments on rehabilitation aims of the sentence.

1 <sup>st</sup> level of node	2 <sup>nd</sup> level of node	3 <sup>rd</sup> level of node	Description of the last node
			6.4.2.3. Incapacitation. Comments on incapacitating convicted defendants.
			6.4.2.4. Elimination. Comments on eliminating a type of defendants through the sentence.
		6.4.3. Compensating victims.	Comments on compensating victims as part of the sentence.
7. Judges' experiences			Comments on different experiences, dilemmas, which judges have had to face.
8. Criminal justice reform			Comments on the shift from the quasi-inquisitorial to the adversarial system.
9. General opinions on the President's strategy of "fighting a war on organised crime"			General comments and opinions on this security programme.
10. Notes on the case study	10.1. HM state	10.1.1. Context linked to insecurity	Comments describing ways in which the context has changed in regards to insecurity and violence.
		10.1.2. General context	Comments describing general changes in the context.
		10.1.3. Context linked to the degree of militarisation	Comments describing militarisation as part of the context.
	10.2. LM state	10.2.1. Context linked to insecurity	Comments describing ways in which the context has changed in regards to insecurity and violence
		10.2.2. General context	Comments describing general changes in the context.
		10.2.3. Context linked to the degree of militarisation	Comments describing militarisation as part of the context.

## APPENDIX 3

# Keys and concepts used to analyse trial court judgements

This appendix is divided into two main sections. Part 1 describes all aspects of judgements registered. Part 2 details the rulings' titles used by courts in regards to weighing police evidence, circumstantial evidence, references to impunity and sentencing.

## Part 1

Below are described all relevant aspects of the examined judgements that were registered in spreadsheets to conduct the analysis.

### 1. *General aspects of the case*

1. Number of case. Number allocated to the judgement generally based on the date the judgement was issued.
2. Location. The place where the court which decided is located, it can be either one of the cases, LM state or HM state.
3. File number. The file number is crucial to identifying the case. It is formed by the number assigned by the court consecutively, and the year it was opened.
4. Court. Refers to the number of the court which heard the case; it does not have any details of the judge.
5. Date of facts. Date when the offence occurred.
6. Date of the judgment. Date when the judgement was issued.

### 2. *Offence*

1. Minimum description of the facts. A summary of the facts was registered. When the version of police officers was different from that of the defendant, both accounts were noted despite that the court decided on what version should be the official or truth of the matter. Most facts involved the way in which the arrest took place and the way in which the offence was been committed because most offences lack investigation and are "caught in flagrancy". It was registered whether there were any disagreements between the parties concerning the arrest and/or the drugs' ownership.
2. Type of offence. Whether the involved offence was drugs or fire arms.
3. Detailed charge 1. The specific offence of the indictment was registered, including the type and amount of drug involved. If the offence changed during the course of proceedings, both offences were registered. In addition, if there were several suspects, each charge per person was registered.
4. Detailed charge 2. If there was more than one charge, this was described here in the same manner.

### **3. Result**

1. Convicted or Acquitted. The sense of the final verdict issued by the trial court.
2. Sentence. If convicted, the sentence in terms of length of imprisonment and the fine was described.
3. Sentencing benefits. Whether parole benefits were granted or not was noted without describing the type of benefit that was offered to the defendant.
4. Intermediate resolution. Any appeals filed against the intermediate resolution were registered, as well as by whom was it appealed.

### **4. Offender**

Although rich data concerning the offender is routinely collected and registered during proceedings. Most of the defendants' personal characteristics are legally protected for being personal data. The only information available tends to be: gender, salary and past convictions records.

1. Gender. Male or female.
2. Salary (pesos per week). Generally information concerning the defendant's income is used by the court to calculate the fine imposed so it is generally available in the public version of the written judgement.
3. Past convictions. If the defendant had any past criminal records, the specific offence was registered.
4. Drug addictions. Any drug addiction was registered, based on the toxicology exam practiced on the defendant by officials in prison.

### **5. Court's arguments on pondering police evidence**

In all cases, the prosecution relied heavily on evidence produced by police officers or military members.

1. Article 289. It was registered whether judges assessed police officers' testimonies based on that the testimonies complied with requisites and characteristics specified in article 289 of the Federal Criminal Proceedings Code.
2. Police's interest in crime prevention. It was recorded whether courts argued that police officers' testimonies were valid because there was no reason to think they intended to involve the defendant unfairly, as their service is deemed independent and focused on crime prevention.
3. Police's testimonies are valid because coincide among them. It was recorded whether courts gave greater weight to police testimonies holding their version of the facts was corroborated based on that each police/soldier's version of the facts coincided amongst each other's versions.
4. References to rulings on police's alleged independence. It was registered whether courts used or quoted rulings which claim that police's testimonies are to be considered independent when examined as witnesses.

### **6. Court's arguments used to examine prosecutor's evidence**

1. Collected evidence during pre-trial is valid. I recorded whether the court deemed valid the evidence produced during pre-trial.
2. Court excusing prosecution's lack of evidence. I registered whether the court

addressed the issue of the prosecutors' lack of evidence.

3. Evidence produced by prosecution during trial proceedings. It was recorded whether prosecutors produced evidence during trial proceedings, and in particular, whether they used witness testimonies.

#### *7. Defence evidence*

1. Type of defence attorney. The type of attorney the defendant had, either private or public, was registered.
2. Defendant's statement. It was recorded whether the defendant confessed, whether he counter-argued not carrying the drug allegedly found on him and whether he counter-argued that he did not have the intent to supplying the drug but acknowledge the drug was his. Also, it was recorded when defendants did not testify.
3. Documentation. Whether the defence produced documentary evidence was recorded.
4. Witness testimonies. Whether the defence produced witness evidence was registered.
5. Confrontation hearing. Whether a confrontation hearing took place between the defendant and witnesses (including police officers) or codefendants, as asked by the defence.
6. Expert evidence. Whether the defence produced any kind of expert evidence was recorded.

#### *8. Court's arguments used to examine defence evidence*

1. Evidence was discarded because implied a defensive strategy. It was registered when the defence's testimonies were dismissed by the court because accordingly implied a defensive strategy to liberate the defendant.
2. Denying all facts without offering any evidence by the defence would be invalid and foster impunity. It was registered when judges argued the defendant should prove their version of the facts rather than simply denying them, as impunity would be otherwise enhanced. This argument was traced in a non-binding ruling titled "Confession, lack of".
3. Evidence was discarded because no other evidence was produced to sustain the allegation. It was registered when courts dismissed defence's witness or defendants' testimonies based on that no other evidence was produced to sustain the allegation.
4. Testimonies did not assist the defence because confirmed that the defendant was in the place and time in which the offence took place. At times witnesses coincided with circumstantial aspects, despite that their testimony held a different version of the facts. It was registered when courts gave evidentiary weight to the information concerning circumstantial features that coincided with the prosecution's version of the facts and discarded the data that sustained a different version or a different case.
5. Confrontation hearings were discarded because each participant confirmed their past testimonies. It was recorded when statements produced in confrontation hearings were discarded by courts because each participant (i.e. the defendant

and the police officer who arrested him) reinforced their version, respectively.

6. Defence's documents were discarded because were not ratified in court. It was registered when courts discarded documents presented by the defence based on that these were not ratified before the court.
7. Defendant's testimony is taken as a partial confession. Courts may only consider parts of confessions that affect defendants negatively, based on that defendants at times confess but also include an exculpatory element which is discarded by the court. This is based on a binding ruling issued by the SCJN titled "Confession. The defendant's statements has a confession character in a case of simple possession of drug when the defendant does not acknowledge the intent and only argues it was for his personal use".
8. Other in acquittal. Used to include arguments used by the court when acquitting. If there is no acquittal in the case, it should say: N/A.
9. Other. I registered any additional aspects of the case.

#### *9. Use of Property searches*

1. Practice of a property search. It was registered whether a property search was conducted during proceedings.
2. Irregularities. It was registered whether any irregularities had been reported by any of the parties.
3. Using the property search in the cases' deliberation or outcome. It was registered whether courts drew on evidence collected during the property search.

#### *10. Court's reactions to mistreatment and unlawful behaviour practices*

1. The defendant is free to press charges against perpetrators. It was recorded when the courts mentioned the defendant was free to seek reparation through a different proceeding.
2. No evidence to suggest perpetrators were the police. It was registered when the court argued that the defendant had no evidence to sustain the perpetrators responsible for mistreatment injuries were the police.
3. Reported injuries which may heal within a 15 day period, according to official medic. It was recorded when courts mentioned defendants had non serious injuries (those which tend to heal within the following 15 days). There were some judgements that did not include results of the medic exam. This was also reported.

#### *11. Court's arguments on sustaining the intent or purpose of selling/distributing drugs or the defendant's personal consumption*

Different circumstantial pieces of evidence were used by courts to determine whether the drug was carried for a particular intent, generally, for selling it. If the case involved a different offence i.e. simple possession, commerce, etc., "N/A" is reported, except for when circumstantial evidence was used.

1. The amount of drug carried. It was registered when courts sustained that the amount of drug the defendant was carrying indicated the intent to supply. The amount of confiscated drug is used as a threshold by law and the courts to sustain whether the drug was held for the purpose of the defendant's personal use

or for a different purpose such as selling it.

2. The way the drug was packed. It was recorded when courts sustained that the way in which drugs were packed indicated the intent to supply.
3. The place and time of arrest. It was registered when courts mentioned that the place and time, such as being on the street in night time were indications of having the intent to supply, due to that drugs are easily distributed in public spaces and during night time.
4. The money found on the defendant. It was recorded when courts argued that the money found on the defendant was the profit earned by the defendant distributing drugs.
5. Illicit drugs market related arguments. It was registered when courts argued that circumstantial evidence was consistent with how the illicit drugs market works which helped verify the intent to supply.
6. References to impunity. It was recorded when courts mentioned concern for impunity when claiming an offence occurred or that the defendant was guilty, as mentioned above when judges refer to that impunity may be fostered in case the defendant's statement is taken as valid, disregarding existing incriminating evidence.
7. References to judicial experience. It was registered when courts used the argument of "having experience in the judiciary" to assert something, such as the intent of selling a particular drug.
8. References to context. It was registered when courts referred to the current context of drug violence and drug trafficking to sustain a particular aspect of the case.
9. Addiction used by the judge. It was registered when courts relied on the defendant's addiction when examining evidence, either when deliberating on the specific charge (i.e. simple possession or aggravated possession) or imposing the final sentence.
10. Reference to rulings concerning validity of indirect evidence. It was registered whether courts used rulings that authorise the use of indirect evidence for demonstrating the purpose of selling, distributing, etc. Indications rather than of the intent being fully proved would suffice.

#### *12. Court's arguments when acquitting*

1. The only source of incriminating evidence was not valid. It was registered when courts deemed the incriminating evidence produced by the prosecutor as invalid due to being produced irregularly or unlawfully.
2. Prosecution failed to produce sufficient evidence. It was registered when courts held that the prosecution had not produced compelling evidence hence the defendant had to be acquitted.

#### *13. Aspects the Court took into account when sentencing*

The following aspects are considered based on articles 20, 51 and 52 of the Federal Criminal Procedure Code. Most of the times these are only mentioned and at best verified with the same evidentiary material produced in court.



1. Ways in which the offence was committed. It was registered when courts mentioned the way in which the offence happened when determining the final sentence.
2. Offender's behaviour when offended. It was recorded when courts mentioned the offender's behaviour during the offence when determining the final sentence, for instance, the fact that the defendant acknowledged possessing the drug.
3. Dangerousness linked to the offence or/and the offender. It was registered when courts made references to doctrinal justifications for considering the risk linked to drugs offences, rather than specific aspects of the case.
4. Minimum sentence does not contravene due process rights. It was registered when judges argued that applying the minimum sentence does not embed a violation of rights, based on a ruling titled "Minimum sentence does not contravene constitutional rights."
5. Past convictions. It was registered when courts took into account the defendant's past convictions so, for instance, parole was denied for recidivists.
6. Extra. Any other arguments produced.

## Part 2

Below the title of rulings referred to or quoted by courts are mentioned.

### *1. Rulings on police evidence*

1. Ruling titled: "Police officers, evidentiary weight of their statements."
2. Ruling titled: "Witness statement, has full effectiveness when police officers coincide about the way in which the arrest and the confiscation of the drug took place."
3. Ruling titled: "Police arrest report. Its validity when ratified before the prosecution."
4. Ruling titled: "Federal police, data the police reports must contain."
5. Ruling titled: "Police, their testimonies."

### *2. Rulings on circumstantial evidence*

1. Ruling titled: "Possession of narcotics and psychotropic in drugs offences, necessary to link with the intent."
2. Ruling titled: "Drugs offences, the intent to supply drugs constitutes an essential element of the legal description established in article 195 of the Federal Criminal Code, which can be demonstrated with circumstantial evidence."
3. Ruling titled: "Circumstantial evidence, its relevance."
4. Ruling titled: "Circumstantial evidence, its evidentiary value."
5. Ruling titled: "Drugs offences, the adequate interpretation of the first paragraph of article 195 of the Federal Criminal Code (Reformed)."
6. Ruling titled: "Circumstantial evidence, its configuration."

7. Ruling titled: “Drugs offences, evidence to demonstrate the essential elements of the offence established in article 195 of the Federal Criminal Code.”
8. Ruling titled: “Drugs offences, to demonstrate that the subjective element of the offence being the intent to supply the drugs established in article 195 of the Federal Criminal Code, has preponderant weight the quantity of the drug found.”
9. Ruling titled: “Drugs offences, in determining the quantum of the sentence, quantity and variety of confiscated drugs.”
10. Ruling titled: “Drugs offence, in its form of possession, the circumstance that the quantity of the drug exceed the threshold established in Appendix 1’s table of article 195 bis of the Federal Criminal Code, is sufficient by itself to demonstrate that the possession of the drug had the intent to carry out any of the conducts established in article 194 of the mentioned code.”
11. Ruling titled: “Drugs offence, in its generic form of possession of drugs, to demonstrate it is legally correct to take into account the quantity of the drug and the other circumstances of the criminal event when the weight of the drug does not exceed the threshold established in Appendix’s tables established in the Federal Criminal Code.”

## 2. *Ruling on impunity*

1. Ruling titled: “Confession, lack of it.”

## 3. *Rulings on minimum sentences*

1. Ruling titled: “Minimum sentence, does not contravene constitutional rights.”
2. Ruling titled: “Minimum sentence, it is not necessary that imposing a minimum sentence is justified.”
3. Ruling titled: “Minimum sentence, compulsory.”



